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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

FLORIDA MACHINE & FOUNDRY COMPANY AND FLECO CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Florida Machine and Foundry Company and Fleco Corporation respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 25, 1972.

OPINIONS BELOW

The Order of the Court of Appeals from which this petition is filed is not reported and appears in Appendix "A" hereto commencing at page 1a. A Petition for Reconsideration of this Order was denied on February 17, 1972 (Appendix "B", page 2a), and Judgment for Respondent, printed herein at page 3a, Appendix "C", was entered February 25, 1972. The Court's Order affirmed a Supplemental Decision and Order of the National Labor Relations Board, 190 NLRB No. 109 (1971), reprinted here as Appendix "D", pages 4a-6a, issued pursuant to the Court's remand. The original Opinion of the Court ordering remand is reported at 441 F.2d 1005 (C.A.D.C. 1970), reprinted herein at Appendix "E", pages 7a-22a. The original Board Decision and Order appears at 174 NLRB 1156 (1969), reprinted at Appendix "F", pages 23a-27a, and the Trial Examiner's Decision on which the Board's original Decision and Order was based is reprinted herein at Appendix "G", pages 28a-62a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, following a denial of a Petition for Reconsideration on February 17, was entered on February 25, 1972, and this petition for certiorari was filed within 90 days of the court's judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e).

QUESTIONS PRESENTED

1. Whether the Board may properly hold that an employer violated his bargaining obligation where an essential predicate of such holding was the Board's disapproval of the same type of management rights

proposal as the Court sustained in *NLRB* v. *American National Insurance Co.*

2. Whether the Court of Appeals abdicated its reviewing function under the Act by allowing the Board to perpetuate upon remand the fundamental error of its original decision.

3. Whether the Board and the court below applied proper evidentiary standards in holding, without any evidentiary support, that the strike was caused by employer unfair labor practices, thus depriving the employer of his legal right to replace the strikers and imposing on him a financially onerous back pay burden.

STATUTES INVOLVED

The statutes involved are 29 U.S.C. § 158(a)(1), (3), (5), (d) and 29 U.S.C. § 160(b), which are set out in full in Appendix "H" to this petition at pages 62a-66a.

STATEMENT OF THE CASE

This case involves the question of the nature and scope of the bargaining obligation under the Act.

The case was twice before the court below. The Board had found that the employer had violated his bargaining obligation by insisting "that the Union accept contract proposals which drastically curtailed the Union's representation rights," and were so "inherently obnoxious" to the Union as to constitute evidence of bad faith (App., 13a, 47a).

The employer proposals which the Board faulted were (1) a standard zipper clause foreclosing negotiation on new matters during the terms of the agreement, (2) a standard management rights clause, and (3) a standard clause restricting arbitration of rights

reserved to management. These clauses are common in labor agreements and a similar management rights clause was upheld by the Court in *American National Insurance.*

In its initial review, the Court of Appeals remanded the case to the Board for further findings. The court detected "several misconceptions entertained by the Board as to its proper role" (App., 12a). The court pointed out that, under prevailing decisions of the court in *H. K. Porter* v. *NLRB,* 397 U.S. 99 (1970) and *NLRB* v. *American National Insurance,* 343 U.S. 395 (1952), the Board was without power to require a party to make concessions or agree to any proposal. The court observed that

> "this was the effect of the Board's adoption of the Examiner's finding that certain contract terms offered by the Employer were so inherently obnoxious to the best interests of the Union as to constitute evidence of bad faith . . ." (App., 13a).

The court was further troubled by the Board's handling of the important issue of the causation of the strike. In this regard, the court below instructed the Board to examine the record on this issue, stating:

> ". . . the conclusion that the strike was not an economic strike but rather was an unfair labor practice strike may or may not stand up after the Board's reconsideration of the issues . . ." (App., 20a).

The Board was directed to "reevaluate the entire controversy" (App., 20a).

The Board did not do so.

In its Supplemental Decision, the Board simply listed in a single paragraph five "factors" which in

their totality the Board held warranted its finding of bad faith. The principal and primary "factor" was unspecified contract proposals "which would have drastically curtailed the Union's representation rights" (App., 6a).

The other factors were relatively minor. They were:

1. Alleged delays in scheduling bargaining meetings.

2. Alleged delays in supplying information to the Union months after the strike started.

3. Alleged promises after the strike started of a 10 cents per hour wage increase to a few non-strikers; and

4. Alleged opposition to the Union by the employer in a preceding election campaign (App., 6a).

The Board did not "reevaluate the entire controversy"; nor did the Board even allude to the causation of the strike. The Board clearly and plainly ignored the instructions of the court.

Without explanation—indeed without the benefit of oral argument—the court below enforced the Board's Supplemental Decision in a brief one paragraph "Order" (App., 1a-2a). A motion for reconsideration was denied (App., 2a).

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court

The Board's Supplemental Decision and Order, which the court below enforced without opinion, depends for its correctness on the totality of the "factors" which the Board found was evidence of the Company's bad faith bargaining. This is so because the Board's bad faith bargaining finding depended upon the *com-*

bination of these factors. Hence, if one of the five factors, and clearly the primary one, is erroneous, the court's bad faith bargaining conclusion should fail; and if the Company bargained in good faith, the resulting strike was an economic one and the Company was entitled to hire and retain replacements and should not be subjected to a heavy back pay award.

The prime factor in the Board's bad faith conclusion was the Company's alleged insistence on contract proposals which would have "drastically curtailed the Union's representation rights" (App., 6a). The Board's Supplemental Decision identifies these condemned proposals as the management rights and grievance arbitration proposals, although the Trial Examiner (App., 48a) also inveighed against the Company's "zipper" clause as well. The Board's Supplemental Decision characterizes the management rights provision as follows:

> "[The management rights proposal] would have vested in management broad authority to take action affecting working conditions without consulting the Union and without subjecting such action to review in a grievance arbitration proceeding" (App., 6a).

The action of the court below, in enforcing the Board's condemnation of the Company's management rights clause, is in direct conflict with this Court's opinion in *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952), where this Court approved as unobjectionable a stronger management rights clause than that proposed by the Company here.[1] The court below also erred, after recognizing the problem in its first

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[1] See Appendix "I" to this Petition for a comparison between the language of the two management rights proposals.

opinion, in eventually permitting the Board to pass on the legality of contract proposals on mandatory subjects of bargaining in direct conflict with this Court's opinion in *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970).[2]

It is clear that to comply with the Board's Order, the Company must forego those bargaining proposals which the Board has condemned. But this Court has specifically forbidden the Board "to compel a company . . . to agree to any substantive contractual provision of a collective bargaining agreement." *H. K. Porter* v. *NLRB,* 397 U.S. at 102. For, as this Court earlier pointed out in *NLRB* v. *American National Insurance Co.,* 343 U.S. 395, 404,

> ". . . it is equally clear that the Board may not, *either directly or indirectly,* compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements" (emphasis supplied).

By telling one party to negotiations that its bargaining proposals are such as to exhibit bad faith, the Board is surely "sitting in judgment" upon the "substantive terms" of a collective bargaining agreement.

Since this disapproval of the employer's lawful contract proposals was an essential "factor" in the Board's finding of refusal to bargain, the Board and the court below have placed themselves in direct opposition to the rulings of the Court.

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[2] In addition, the position of the court below conflicts in this particular case with decisions of sister circuits, and is an additional reason for granting the writ on this issue. *Chevron Oil Co.* v. *NLRB,* 442 F. 2d 1067 (C.A. 5, 1971); Rule 19, Rules of the Supreme Court.

The other "factors" on which the Board relied were clearly secondary and could not, standing alone, sustain a finding of bad faith.

In any event, the reliance by the Board on its disapproval of a lawful management rights proposal as the principal element of its finding of bad faith so "infected" the Board's holding (as the court below first held), that it was incumbent on the Board to disentangle itself from its "several misconceptions." This the Board failed to do in disregard of the lower court's specific directions on remand.

The court below, in failing to enforce its own proper directions, has inexplicably abdicated its "conventional judicial function" in contravention of the *Universal Camera* rule.

There, the court instructed the Courts of Appeals to assume a more meaningful supervisory role in the review of Board decisions:

> "... courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions . . . Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bounds." *Universal Camera Corporation* v. *NLRB,* 340 U.S. 474, 490 (1951).

The case therefore presents one of those instances where this Court should intervene where its own judicial standards have been grossly "misapprehended or misapplied." 340 U.S. at 491.

2. The Decision on the Central Issue of Strike Causation Constitutes a Decision on an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court

This Court has not yet addressed itself to a major issue inherent in practically every Labor Board case involving allegations of unfair labor practices and an ensuing strike. That issue is the required evidentiary support for the Board's conclusion that a particular strike was caused by employer unfair labor practices.

The issue is of overriding economic consequence in all such cases because if the strike is deemed to have been caused by unfair labor practices—as was the finding here—the employer must, upon demand, reemploy all strikers, discharging, if necessary, all replacements that were hired, and make the strikers whole for any loss of pay and other benefits from the time they demand reinstatement.[3] On the other hand, if the strike is deemed economic, the employer is free to replace strikers, need not discharge replacements to make room for strikers seeking reinstatement, and is not liable for loss of wages and benefits for any replaced striker. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

As the record in this case demonstrates, the Labor Board, with the acquiescence of the Court of Appeals in this instance, swept this all-important issue of the strike causation under the rug and simply placed the blame for the strike on the employer without evidentiary support or decisional explication.

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[3] In practical terms, this generally means a doubling of the labor costs to produce the same amount of goods, since the Company is required to pay the strikers for their lost wages as if they and not the replacements were working.

In its first opinion the Court of Appeals showed its sensitivity to the issue of causation by stating:

> "[T]he conclusion [of the Board] that the strike was not an economic strike but rather was an unfair labor practice strike may or may not stand up after the Board's reconsideration of the issues already outlined" (App., 20a).

Yet on remand the Board never even considered the central issue of causation, and the court below rubber stamped the decision.

The Board apparently engaged in a presumption that because it had found unfair labor practices preceding the strike that these alleged practices caused the strike. But, the imposition of such a heavy financial liability on an employer should not be allowed to rest on this kind of syllogistic reasoning. It is at least equally probable that a bargaining strike is called for the purpose of applying economic pressure in support of the Union bargaining demands. Before the scales are tipped so heavily against the employer, there should be an evidentiary inquiry into the causal relationship between the unfair labor practice and the strike.

The Board, however, with the eventual approval of the court below, was content to rest upon its *post hoc, ergo propter hoc* presumption.

In so doing the decision below is in conflict with the rule in other Circuits. In *Filler Products, Inc.* v. *NLRB,* 376 F.2d 369 (C.A. 4, 1967), the court held that the Board must show by "credible evidence" that the alleged unfair labor practice had a "causal connection" with the strike. See also *NLRB* v. *Scott & Scott,* 245 F.2d 926, 929-930 (C.A. 9, 1957); *Winter Garden Citrus Products Cooperative* v. *NLRB,* 238 F.2d 128, 129-130 (C.A. 5, 1956).

Far from elucidating its holding, the Board's Supplemental Decision further confused the issue of causation. The finding of bad faith bargaining was based on the "totality" of five factors, two of which occurred *after* the strike and thus could not have caused the strike and were specifically found not to have prolonged the strike (App., 51a-52a).

A third factor—the Company's alleged preelection conduct—occurred long before the bargaining even started.[4] The fourth factor—the alleged bargaining delays—were in the early stages of the discussions and could not have been a significant factor in the decision to call a strike.

Consequently, by a process of elimination, if the Union's claim of walking out to protest Company bad faith is genuine, the "bad faith" which the Union thought it perceived must have come from the Company's management rights proposal. But, this pro-

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[4] The Board's reliance on such remote pre-election conduct to find a refusal to bargain has been specifically condemned by another Circuit. In *NLRB* v. *Stevenson Brick & Block Co.*, 393 F. 2d 234, 238 (C.A. 4, 1968), Judge Sobeloff stated:

> "The Trial Examiner further predicted his decision upon the employer's unfair labor practices committed more than seven months before the bargaining sessions began. Such remote conduct has little probative value in determining the employer's bargaining intentions. This misconduct cannot, therefore, support the charge of refusing to bargain in violation of section 8(a)(5) without some showing of bad faith at the negotiations themselves. As indicated above, no such showing has been made."

The Board's reliance on this factor also flies in the face of the time limitations specified in Section 10(b) of the Act and this Court's ruling in *Local Lodge No. 1424, IAM v. NLRB*, 362 U.S. 411 (1960). All of the incidents relied upon preceded the six month limitation specified in Section 10(b).

posal, especially standing alone, does not amount to, and cannot support, a finding of bad faith. Hence, there is no foundation for a conclusion that the strike was an unfair labor strike.

In any event there is no mention or explanation of strike causation in the Supplemental Opinion.

The time has clearly come for this Court to mark out definitively for the guidance of the Courts of Appeal and the Board the legal standards governing the quality and quantity of evidence sufficient to warrant so significant a finding of strike causation.

The issue of strike causation and responsibility is a recurring one of importance in the administration of the Act and potentially affects every employer and every Union where there exists a collective bargaining relationship under the law.

CONCLUSION

For the above specified reasons, the Petitioner respectfully prays that this Court grant a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

Filed Nov. 9, 1971

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 22,872

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 23,010

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

FLORIDA MACHINE & FOUNDRY COMPANY and
FLECO CORPORATION, *Respondents*

Before: BAZELON, Chief Judge; TAMM, Circuit Judge and MATTHEWS*, Senior District Judge.

Order

On consideration of the briefs filed by the National Labor Relations Board and the United Steelworkers of America, AFL-CIO on the petition for review and application for enforcement on remand of an order of the National Labor Relations Board, it is

ORDERED by the Court that the petition for review is denied, and it i

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* Sitting by designation pursuant to the provisions of Title 28 U.S. Code, Section 292(a).

FURTHER ORDERED by the Court that the application for enforcement on remand of the order of the National Labor Relations Board is granted.

Pursuant to the provisions of Rule 19 of the Federal Rules of Appellate Procedure, counsel for the Board within 14 days from the date of this order, shall serve upon the Union and file with the clerk a proposed judgment in conformity with this order.

Filed Feb. 17, 1972

APPENDIX B

Order

Before: BAZELON, Chief Judge, TAMM, Circuit Judge, MATTHEWS*, Senior District Judge.

On consideration of the petition by Florida Machine and Foundry Company and Fleco Corporation for reconsideration of the order filed November 9, 1971, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
DIB
EAT
B.S.M.

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* Sitting by designation pursuant to the provisions of Title 28, U.S. Code, Section 292(a).

Filed Feb. 25, 1972

APPENDIX C

Judgment

Before: BAZELON, Chief Judge; TAMM, Circuit Judge and MATTHEWS,* Senior District Judge.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement on remand of its order against Florida Machine & Foundry Company and Fleco Corporation, its officers, agents, successors, and assigns and upon United Steelworkers of America, AFL-CIO's petition for review of the Board's Order, dated May 28, 1971. The Court having carefully considered the briefs and transcripts of record filed in this cause, on November 9, 1971, handed down its Order denying the petition for review and granting the Board's application for enforcement on remand of its order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Florida Machine & Foundry Company and Fleco Corporation, its officers, agents, successors, and assigns, abide and perform the directions of the Board in said order contained.

DAVID W. BAZELON
Chief Judge, United States Court of Appeals for the District of Columbia Circuit

EDWARD ALLEN TAMM
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

BURNITA SHELTON MATTHEWS
Senior District Judge, United States District Court for the District of Columbia

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* Sitting by designation pursuant to the provisions of Title 28, U.S. Code, Section 292(a).

APPENDIX D

190 NLRB No. 109

D-4905
Jacksonville, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 12-CA-3831, 12-CA-3915(1-3)

FLORIDA MACHINE & FOUNDRY COMPANY and
FLECO CORPORATION

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

Supplemental Decision and Order

On March 13, 1969, the National Labor Relations Board issued its Decision and Order in this proceeding[1] in which it found that the Respondent violated Section 8(a)(5) of the Act by failing to bargain in good faith during negotiations with the certified Union.[2] The Board also found that the Company violated Section 8(a)(3) by discharging and refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work. Finally, the Board found that the Company promised wage increases to nonstrikers in return for their nonsupport of the strike, in violation of Section 8(a)(1).

Thereafter, a petition for review and application for enforcement of an order of the National Labor Relations Board was filed with the United States Circuit Court of Appeals for the District of Columbia. A majority of the court remanded the case[3] for reconsideration of the

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[1] 174 NLRB No. 170.

[2] United Steelworkers of America, AFL-CIO.

[3] *United Steelworkers of America, AFL-CIO* v. *N.L.R.B.*; *N.L.R.B.* v. *Florida Machine & Foundry Company and Fleco Corporation*, — F.2d — (December 4, 1970).

Board's finding that the Company bargained in bad faith. In remanding, the court stated, *inter alia,* that "When the Board bases a finding of bad faith on the fact that the Employer has not made a certain concession to the Union, then the Board is adding to the obligations of good faith bargaining a requirement that certain concessions be made." The court also found improper the Examiner's statement that the Company made no "meaningful" concessions on any major issue, since the Company had made an 8-cent wage offer and there was no evidence that its wage levels were below Jacksonville area standards.

The court concluded that these "errors may well have infected the process by which the Board found the Employer guilty of unfair labor practices and of a failure to bargain in good faith; in fairness to the Employer, however reprehensible its behavior, we must remand the proceedings to the Board for reconsideration."[4]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reexamined the entire record, including the court's opinion, and hereby reaffirms its Decision and Order for the reasons indicated hereafter.

We have reviewed those portions of the Trial Examiner's Decision cited by the court which the court concluded led to an inference that the Company must affirmatively make concessions during bargaining, as well as the Trial Examiner's statement that the Company made no "meaningful" concessions on any major issue despite the Company's 8-cent wage offer. As to the first point, as the court has properly pointed out, an employer is normally

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[4] The court postponed consideration of the other issues in the case "until the Board has reconsidered the questions raised by this opinion."

not required to make any concessions in bargaining and to the extent the language used by the Trial Examiner may so imply, we do not rely on it. Nor do we adopt the Trial Examiner's incorrect characterization of the 8-cent wage offer as not meaningful since, standing alone, it may well be construed as a reasonable offer.

Our review of the entire record, including the disavowal of certain language noted previously, does not, however, persuade us that a different conclusion is warranted here and we still conclude that the Employer has failed to bargain in good faith based upon the following: (1) As background, the company statements prior to the representation election to the effect that the Company did not want the Union and would not sign a contract if the Union won the election; (2) the Company's failure to cooperate with the Union in scheduling bargaining sessions; (3) the Company's failure to supply the Union with wage data within a reasonable time after its request therefor; (4) the promises of wage increases to employees who did not support the strike; and (5) the Company's insistence on contract proposals which would have drastically curtailed the Union's representation rights. These proposals included a management rights provision which would have vested in management broad authority to take action affecting working conditions without consulting the Union and without subjecting such action to review in a grievance arbitration proceeding. Our inference of bad faith was and is based on the totality of the Employer's position, and not his position on any single contract provision.

Accordingly, we reaffirm the findings, conclusions, and remedy provided in our original Decision and Order.

Dated, Washington, D.C., May 28, 1971.

JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,872

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 23,010

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

FLORIDA MACHINE & FOUNDRY COMPANY and
FLECO CORPORATION, *Respondent*

Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board

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Decided December 4, 1970

Mr. George C. Longshore, with whom *Mr. George H. Cohen* was on the brief, for petitioner in No. 22,872.

Mrs. Corinna L. Metcalf, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, Na-

tional Labor Relations Board, were on the brief, for petitioner in No. 23,010 and respondent in No. 22,872.

Messrs. Guy Farmer and *John A. McGuinn* for respondent in No. 23,010.

Before BAZELON, *Chief Judge,* TAMM, *Circuit Judge,* and MATTHEWS,* *Senior Judge,* United States District Court for the District of Columbia.

TAMM, *Circuit Judge:* Congress in enacting the National Labor Relations Act gave courts the power to review orders of the National Labor Relations Board (hereafter "the Board"). Findings with respect to questions of fact when supported by substantial evidence shall be left to the discretion of the Board. The Board, of course, is in a position neither to impose certain rules upon parties to a labor dispute while the proceedings are under way nor to abandon its impartiality in aid of one party or the other. In the instant case it would not be difficult for the Court to find in favor of the Union, nevertheless, based on the law we are compelled to disagree with the Board's decision to so find and we remand the dispute for further consideration.

The present controversy began when the United Steelworkers of America, AFL-CIO (hereafter "the Union") was certified on October 3, 1966, as the collective bargaining representative of the production and maintenance workers employed by Florida Machine and Foundry Company and Fleco Corporation (hereafter "the Company" or "the Employer"). The Union in due course submitted a contract proposal to the Company which then responded with a counter-proposal; these were analyzed and discussed at a number of negotiating sessions during which the position of each party emerged and began to take shape. After about five months of negotiation, however, the Union ap-

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* Sitting by designation pursuant to Title 28, U.S. Code, Section 292(a).

parently despaired of succeeding through this channel and a strike was called for February 28, 1967. Meetings continued during the strike and the parties came closer to a contract, but meanwhile, the Company began to replace the striking workers and, before too long, the strike faltered. Less than five months after it had begun, the strike ended and the Union requested permission for its members to return to work. Thereafter, the Union filed charges with the Board alleging that the Company had violated the National Labor Relations Act by refusing to bargain with the Union in good faith in its effort to negotiate a contract acceptable to both parties. The Union also charged that the Employer wrongfully refused to reinstate employees who had struck in protest against the Employer's refusal to bargain in good faith.

A Trial Examiner presided over a hearing at which the parties introduced evidence and interrogated witnesses on the issues raised in the Union's charges. With a few exceptions not immediately relevant, the Board ratified the Trial Examiner's findings and accepted his conclusion that the Company had failed to bargain in good faith. An order was issued instructing the Company to cease and desist from this behavior and to offer certain of the strikers immediate and full reinstatement to their former jobs. This was the background of the case as it came to us upon the Board's petition for enforcement of its order and the Union's appeal from a limited portion of the Board's order concerning the amount of back pay owed to reinstated employees. In view of our disposition of the former issue, we have not considered the latter since the question of back pay arises only after a finding that the Company violated its obligation to bargain in good faith. The errors into which the Board fell while making its decision cast sufficient doubt on that finding to require a remand for reconsideration in line with the observations which follow.

In drafting the order now before us, the Board relied primarily on the Trial Examiner's finding that the Em-

ployer had violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.[1] The Examiner summarized his conclusion as follows:

> I find upon the entire record that although the Company met with the Union and exchanged contract proposals, it did not bargain in good faith, as required by the Act, that is "with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor."

(App. 40.) Since the Employer met with the Union and actively worked on contract proposals, it is necessary to take a very close look at the behavior of the Employer during negotiations and at its proposals before reaching the conclusion that the Employer had no desire to reach an agreement. Accordingly, the data which led the Examiner to a finding of bad faith is the quarry of the present search.

There is evidence in the record from which to conclude that the Employer was not acting in good faith. It was apparent, for example, that the Employer from the beginning had not wanted a union and had done its best to persuade the employees to vote against union representation. Even after the Union was certified as the collective bargaining agent, a residue of this antipathy remained; the

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[1] The relevant provisions of the Act are as follows:

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section providing for collective bargaining];

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [section setting out specific rights and obligations].

29 U.S.C. §§ 158(a)(1), (5) (1964).

Board agreed with the Examiner that there was evidence of this hostility toward the Union in the harshness of the contract terms the Employer proposed. Further support for the bad faith thesis was gained from the Employer's long delay in supplying data on which certain wage offers purportedly were based and from a refusal to provide certain other information in the form requested by the Union. There was also evidence of an informal (and highly inappropriate) offer, on the eve of the strike, of a ten cent per hour raise for those workers who stayed on the job. Finally, there was at least some evidence from which to infer, as the Board did, that the Employer dragged its feet when urged by the Union to schedule frequent negotiating sessions.

The foregoing should make it clear that the record reflects no glory on this Employer; we are in no way tempted to commend the Company for its part in this proceeding. In the arguments to this court it is suggested that the Employer was motivated by a concern for the best interests of its employees and thought these best could be served without the intercession of a union. We are not so naive as to accept such an obvious and juvenile misrepresentation.

At the same time it is well to point out that the negotiation of labor contracts is not a gentle art. Both labor and management have a great deal at stake when sitting down at a bargaining table and this is reflected in the language used and in the proposals advanced for consideration. This court and the Board each must remain aware of how difficult it is to capture the tone of such proceedings from an outside vantage point. What may appear to be an unreasonable, obdurate demand may be no more than the skillful practice of the negotiator's art, designed to wring concessions from the opposite side. Congress has excluded the Board from interfering in this process no matter how strongly it feels about the merits of the proposals under discussion.

Notwithstanding these reservations, it might appear that this court reaches the end of its tether in this area when it finds, as we have, that there is evidence in the record to support the Board's order. The cognoscenti might anticipate first a dutiful nod in the direction of "substantial evidence"—yet another attempt to trap that elusive butterfly with a net of mathematical precision. Ordinarily that would be our course, for we are neither inclined nor empowered to upset administrative findings which might be found to be based on substantial evidence in the record as a whole. *N.L.R.B.* v. *Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). This is not the ordinary case, however, because we have detected several misconceptions entertained by the Board as to its proper role in this labor dispute. These errors may well have infected the process by which the Board found the Employer guilty of unfair labor practices and of a failure to bargain in good faith; in fairness to the Employer, however reprehensible its behavior, we must remand the proceedings to the Board for reconsideration.

Subtle distinctions, such as between the correct and incorrect role of the Board in labor controversies, are difficult to ferret out of a record of substantial length; and, even if such first step succeeds, it is even more difficult to present a concise, composite picture of what is erroneous in contrast to what would have been correct. Nevertheless, that procedure is a present necessity, and one in which we will begin with perhaps the most visible of the distinctions we hope to maintain.

Congress might well have given the Board power to determine the substantive terms of labor contracts, for the Board in the exercise of its expertise would be in a sound position to weigh the competing interests of the parties and to draft terms fair to both. As it happens, however, Congress explicity reserved that power unto the parties themselves. *Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970). The Board is authorized to oversee and enforce the duty of

employer and union "to bargain collectively . . . in good faith," but Congress has made it clear that the obligation of good faith bargaining "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1964). Since the statute involves no compulsion on either party to make a concession or agree to a proposal, then obviously the agency designed to execute the statute is without power to effect a similar compulsion. *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395 (1952). Thus it is a fundamental proposition of labor law that the Board's power in this sphere is rigorously limited; in fact, Congress added section 8(d) to the Act precisely because "criticism of the Board's application of the [bargaining in good faith] test arose from the belief that [the Board] was forcing employers to yield to Union demands if they were to avoid a successful charge of unfair labor practice." *N.L.R.B.* v. *Insurance Agents*, 361 U.S. 477, 486 (1960). *See also* H. R. REP. No. 245, 80th Cong., 1st Sess. 19 (1947).

This leads us to the crux of the problem in the instant case. If we accept the proposition "that [section] 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements" (*N.L.R.B.* v. *Insurance Agents, supra*, 361 U.S. at 487), then we cannot give our approbation to the Board's finding that the Employer was guilty of bad faith bargaining if that finding is based on the fact that the Board did not approve of certain of the proposals advanced by the Employer in the course of negotiations. It appears, however, that this was the effect of the Board's adoption of the Examiner's finding that certain contract terms offered by the Employer were so inherently obnoxious to the best interests of the Union as to constitute evidence of bad faith and an unwillingness to come to agreement. The Examiner found that "[t]he Company proposed and insisted throughout the negotiations that the Union accept contract clauses which drastically curtailed the Union's representation

rights." (App. 41.) In its decision the Board embraced this ruling without comment, although it did retreat to a limited extent from the implications submerged within it. For instance, the Board noted that it did not adopt the Examiner's conclusion that the Employer's refusal to agree to a term providing for compulsory arbitration and the Employer's concurrent proposal for a "no-strike" clause was, as a practical matter, an "insist[ence] that the Union virtually surrender its rights to strike without the usual 'quid pro quo of the compulsory arbitration of grievances.'" (App. 57.)

The Board, however, was not always so careful to observe the distinction between, on the one hand, a permissible inference of bad faith drawn from the proposals the Employer advanced and, on the other hand, an impermissible attempt to compel the Employer to accept certain terms or make certain concessions, an attempt in violation of section 8(d) of the Act. In its brief, for example, the Board urges that "[f]rom a substantive standpoint, . . . the Company's proposal was so disadvantageous to the employees as to call into question the Company's willingness to sign any agreement." (Brief for N.L.R.B. at 23.) After enumerating some of the heinous contract terms advanced by the Employer, the Board concludes, in virtually the same words the Examiner used:

> Since the Company included in its proposals no improvements in existing conditions of employment which might compensate the employees for this sweeping relinquishment by the Union of their right to representation, its proferred contract was one which the Union could not possibly justify to the employees and hence frustrated rather than furthered collective bargaining.

(*Id.* at 24.)

We think that the second statement differs significantly from the first and that the Board there fell on the wrong

side of the line dividing "permissible inference" from "impermissible compulsion." As to the first statement, it may be assumed for immediate purposes that the Board was on safe ground in examining a proposal and finding it "so disadvantageous . . . as to call into question the Company's willingness to sign any agreement." (*Id.* at 23.) We agree, as the Examiner found, that "good faith or its lack is a question of fact as to state of mind, and positions taken at the bargaining table, considered in the context of the whole case, are manifestations of the state of mind with which negotiations are conducted." (App. 42.) Thus it would be legitimate for the Board to infer some degree of bad faith from the Company's insistence on a particularly disadvantageous proposal.

As to the second statement quoted above, however, to the effect that one employer concession might "compensate" the employees for a concession they have made through their representatives, the Board is caught up with more than a mere inference as to the Employer's state of mind. Instead, the Board is dictating substantive negotiating terms in direct violation of section 8(d). When the Board bases a finding of bad faith on the fact that the Employer has not made a certain concession to the Union, then the Board is adding to the obligation of good faith bargaining a requirement that certain concessions be made. We cannot allow the Employer's obligation to be so altered.

This argument proceeds admittedly on a fine distinction, but the distinction was drawn not by us but by Congress and we have no alternative but to enforce it to the best of our ability. In so doing, we must rely as much on nuances in the Board's language as we would ordinarily rely on concrete facts; that is yet another reason why this kind of distinction is particularly difficult to articulate. We are not the first to approach this hurdle nor are we the first to point out the "tension between the principle that the parties need not contract on any specific terms and a prac-

tical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *N.L.R.B.* v. *Insurance Agents,* 361 U.S. 477, 486 (1960).

Having made these observations, we would prefer to be in a position to offer a clear set of guidelines for the Board's future use, but the nature of our power to review does not allow us that prerogative. We hold merely that in the particular circumstances of this case the Board permitted its view on the merits of the substantive terms at issue between the parties to cloud its judgment of the Employer's good faith. *See Collins & Aikman Corp.* v. *N.L.R.B.,* 395 F.2d 277 (4th Cir. 1968). Thus the Board erred by adding to the Employer's obligation to bargain with the Union in good faith an obligation to concede to the Union's demands for certain contractual terms. We discern ample support for our holding in the following passage from *Porter Co.* v. *N.L.R.B.,* 397 U.S. 99, 107-08 (1970):

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . The Board's . . . powers . . . are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

(Footnotes omitted.)

A second example of our dissatisfaction with the Board's order involves the question of wages, one of the major

areas of disagreement between the parties and important because in dealing with the problem the Board again misconceived its role. Because the issue of proposed wage increases will recur in virtually every labor dispute, it is particularly necessary that the Examiner and the Board treat the problems arising in this area with consummate skill supported by a complete record and strictly in accord with both statutory requirements and judicial guidelines. In the instant case the Employer offered an across-the-board wage increase of 8 cents per hour and offered additional selective raises for certain specialized jobs. The Union began with a proposal for a 22 cent across-the-board raise but later reduced this figure first to 20 cents and then to 18 cents. In dealing with the parties' failure to come to agreement on this question, the Board adopted the Examiner's findings, which were as follows:

> As to wages, the Company initially rejected the Union's wage demands in their entirety on the ground that its wage rates were equal to or better than those in the Jacksonville area. Allegedly based on a new area survey, the Company on January 6, 1967, offered to increase the wages of several skilled job classifications to keep them in line with rates for comparable classifications in the area and, on January 25, it offered to increase shift differentials by 2 cents and give a general wage increase of 8 cents. The Company thereafter refused to supply the Union with area wage survey data. After the strike, on October 2, 1967, it unilaterally put its proposed wage increase into effect allegedly because it was at a "competitive disadvantage in the local labor market" and was not satisfied with "the calibre of applicants."

(App. 44.) The Examiner concluded that the Employer's wage offers amounted to "no more than 'surface bargaining' and were part of 'a purposeful strategy to make bargaining futile or fail.'" (*Id.*)

The Examiner also found that the Employer had made "no meaningful concessions on any major issue." (*Id.*) If the question of wages was a major issue, and it seems indisputable that it was, then the Examiner must have found that the Employer had made "no meaningful concession" on wages. The Examiner therefore must have believed that a raise of 8 cents an hour was not meaningful and was an example of mere "surface bargaining." He of course is entitled to make this kind of finding and he is free to draw from it an inference of bad faith, but it is an elementary principle that the Examiner cannot do this without some evidence in the record to support his conclusion. We have sought in vain for such evidence. To the extent that the record sheds any illumination on this question it seems to support the contrary view that the wages already being paid were comparable to those offered by the other employers in the Jacksonville area. The following testimony by one of the Union leaders is illustrative of that point:

> [Counsel for the Employer] ask[ed] us if we had checked the Jacksonville area rates, and I believe I advised him that was one of our major problems—by "our," the working people of—the Union, *that the Jacksonville rates were substandard.*
>
> And, [Counsel] said that the Company had to compete in the Jacksonville labor market, and they were paying a good wage.
>
> And, I asked him how he would compete—how he would compete more poorly if he gave raises, and I don't recall his answer to that.

(App. 421) (Emphasis added.)

From the absence in the record of any evidence on the exact wages being paid in the Jacksonville area, we are forced to conclude either that the Board assumed that the Employer's wage offer was not a meaningful concession or that the Board imposes an obligation on the Employer

to produce evidence proving that its offer is meaningful and penalizes the Employer if it fails to produce such evidence. We have no way of knowing whether the 8 cent offer was "meaningful" by any objective standard, and it is not our function to speculate. Certainly we cannot draw any conclusion from the fact that the Union reduced its proposal from 22 cents to 18 cents whereas the Employer maintained his 8 cent offer; the Union, as a tactical move, may have begun with an extremely unrealistic figure while the Employer may have decided as a matter of bargaining strategy to begin with its maximum offer. We are in no position to rely on such speculation without evidence to support it, but neither is the Board entitled to speculate as it appears to have done here.

It might be argued that the lack of evidence in the record as to wages in the area of the Company was attributable to the Employer's failure to supply the Union with a requested wage survey. Although the record is not clear on this point, it appears possible that the wage survey which the Union requested was the survey relied on by the Employer in formulating raises for four specialized job classifications and not a survey which would throw light on the general wage increase with which we are now concerned. The survey covering the specialized jobs was supplied to the Union and is a part of the record but it is not relevant to the more general problem. The question then becomes whether the Employer had a general obligation to supply evidence to support the reasonableness of its wage offer. We think that this is not the same question as is involved when an Employer has specific wage surveys which it uses while negotiating and yet refuses to provide to the union. *See N.L.R.B.* v. *Acme Insurance Co.*, 385 U.S. 432 (1967). Our objection is to the proposition, implicit in the Examiner's findings, that the Employer has a general obligation to prove that its wage proposal constitutes a meaningful concession whereas the Union has no such obligation. We see no justification in the statute for such a

disparity in the burden of each party. In the absence of proof that the Employer has made wage surveys which it readily could make available to the Union, we hold that the Examiner must solicit such information from the parties before he can make any finding on the reasonableness of either party's wage offer or conclude that either party's offer is evidence of bad faith.

The Board found two specific violations of the Employer's collective bargaining obligation, both of which involved information requested by the Union. The Employer was found to have delayed unreasonably in supplying a certain area wage rate survey, which has previously been discussed, and to have refused to supply certain other information accessible only to the Employer. These findings and the conclusion that the strike was not an economic strike but rather was an unfair labor practice strike may or may not stand up after the Board's reconsideration of the issues already outlined. Since we think a re-evaluation of the entire controversy is required on remand, we think it best to postpone discussion of the Board's two specific findings until such time as it is necessary to take them up. Until the Board has reconsidered the questions presented by this opinion, we are not inclined to comment further on any other aspects of the proceedings.

Remanded for consideration consistent with the views expressed herein.

BAZELON, *Chief Judge, dissenting:* I take no exception to the court's careful statement of the applicable principles of law. Congress has circumscribed the Board's activities in this area with a fine hand, permitting the Board to infer bad faith from particular contract proposals, but prohibiting the Board from dictating any substantive terms of the contract. In practice, the distinction is often difficult to draw. I cannot agree, however, that in this case the Board's action falls on the prohibited side of the line.

The court concludes that the Board in effect required the Employer to make "certain concessions" to the Union. The nature of those concessions is not specified in the opinion of this court, nor is it apparent from the record of the proceedings below.[1] To support its conclusion that the Board acted improperly, the court relies heavily on a single sentence in the Trial Examiner's decision, implicitly adopted in the decision of the Board, and quoted by the Board in its brief on appeal. The Examiner stated that "the Company included in its proposals no improvements in existing conditions of employment which might compensate the employees for this sweeping relinquishment by the Union of their right of representation . . . ." In my view, that statement does not require the Company to make particular concessions. It merely reflects the finding, approved by the court, that the Company's proposal was highly disadvantageous to the Union. The Board relied heavily on the overall tenor of the Employer's contract proposals to support the inference of bad faith, but it did not require alteration of any particular contract term.

With respect to the single issue of wages, it seems to me that the court misconstrues the position of the Board.

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[1] The Trial Examiner's decision might be read to require a provision for compulsory arbitration, but the Board expressly rejected that part of his decision, as the court notes with approval, p. 8 *supra*.

The opinion effectively attacks the proposition that the Employer made no meaningful concession on wages. But the Examiner did not deny that the Employer's wage offers constituted concessions. He found, rather, that "under all the circumstances," presumably including the Employer's position on other issues, those wage concessions "amounted to no more than 'surface bargaining' and were part of 'a purposeful strategy to make bargaining futile or fail.'" The Board's inference of bad faith was based on the totality of the Employer's position, and not his position on any single contract provision. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring and dissenting); Local 833, UAW v. NLRB, 112 U.S. App. D.C. 107, 114-15, 300 F.2d 699, 706-07, *cert. denied*, 370 U.S. 911 (1962).

The Employer's contract proposals considered as a whole, together with other factors enumerated by the majority, provide ample evidence from which the Board could find a failure to bargain in good faith For that reason I would enforce the order of the Board.

APPENDIX F

174 NLRB No. 170

D-1322
Jacksonville, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FLORIDA MACHINE & FOUNDRY COMPANY AND FLECO CORPORATION

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

Cases 12-CA-3831
12-CA-3915 (1-3)

Decision and Order

On April 29, 1968, Trial Examiner Melvin Pollack issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that they be dismissed. Thereafter the Respondent, the Charging Party, and the General Counsel filed exceptions to the Trial Examiner's Decision, and the Respondent and the Charging Party filed supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions,[2] and recommendations of the Trial Examiner with the additions and modifications noted below.

1. We agree with the Trial Examiner that the Company violated Section 8(a)(5) and (1) by failing to bargain in good faith with the Union.

The Trial Examiner further found, and we agree that the Company independently violated Section 8(a)(5) of the Act by refusing to comply with the Union's request for area wage survey data, and by unilaterally increasing wages on October 2, 1967. With respect to the wage survey, however, the record indicates that the Company, through counsel, ultimately sent a letter to the Union dated

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[1] These findings and conclusions are based, in part, upon the credibility determinations of the Trial Examiner, to which the Respondent excepts, on the basis of our careful review of the records, we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all the relevant evidence. Accordingly, we find no basis for disturbing those findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 185 F.2d 362 (C.A. 3).

[2] We do not adopt the Trial Examiner's conclusion contained in the first paragraph of Section 4 in his "Analysis and Conclusions" that as a practical matter the Company was insisting that the Union virtually surrender its rights to strike without the usual "quid pro quo of the compulsory arbitration of grievances."

As we are in agreement with the Trial Examiner's conclusion that the strike was an unfair labor practice strike at all times, we find it unnecessary herein to consider the rights of economic strikers. However, we do not adopt his conclusions on the rights of economic strikers, to the extent they do not conform to the Board's views as expressed in *The Laidlaw Corporation*, 171 NLRB No. 175.

August 15, 1967, which included the wage "survey" as to four job positions. The record further shows however, that the Union initially requested such information by letter, dated May 31, 1967, and renewed its request on July 27 and August 8. While letter from the Company to its counsel which gave the survey information was dated June 12, 1967, it was not transmitted to the Union until August 15. Since the information was readily available on or about June 12, we find that the 2 months delay in transmitting such information was unreasonable and therefore violative of Section 8(a)(5) of the Act.

2. The Trial Examiner, in footnote 20 of his Decision, found nothing improper in the Company's refusal to supply the Union with the names, classifications, and wages paid to employees after the strike began. The Trial Examiner stated that counsel for the Company explained that the Company was hesitant to supply the names of employees assertedly because of the "large number of instances involving violation and intimidation by strikers against employees working" and offered to supply information on the wages paid to any strike replacement believed by the Union to be paid more than was the replaced striker. However, mere assertions of the Company's position does not constitute affirmative proof of harassment. Absent more positive evidence of employee harassment, the Company was not relieved of its obligation to furnish such information and its refusal to do so is an additional violation of Section 8(a)(5).[3]

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[3] Member Zagoria agrees that the Respondent violated Section 8(a)(5) in refusing to furnish the names of employees in the unit, and their wages. However, in so finding, Member Zagoria notes that such information was presumptively relevant to the Union's function as collective-bargaining agent. The Union's latest request for the information occurred on August 7, well after the strike was over and many of the strikers had returned to work. The Employer's written refusal did not occur until August 15. Member Zagoria does not find it necessary, in the circumstances of this case, to decide whether the Respondent had a similar duty to supply this information during the pendency of the strike.

3. The Trial Examiner failed to include the name of employee Percy Jackson on Appendix A of his Decision. The Amended Consolidated Complaint names Jackson as an employee requesting reinstatement on or about April 15, 1967, and the Respondent's answer admits this fact. Jackson was one of the employees to whom the Respondent sent a termination letter on March 16, 1967. An exhibit shows that a list of strikers that requested reinstatement to the job includes the name of Jackson and a date of application of July 10, 1967, which is the date of the Union's telegraph application for reinstatement of strikers. A list purporting to show dates on which strikers were replaced does not indicate that Jackson was replaced. In view of these facts we shall add the name Percy Jackson to Appendix A, as a striker entitled to reinstatement and backpay.

In the Remedy section of his Decision, the Trial Examiner recommended that the Respondent make the strikers whole for any loss of pay suffered because of the discrimination against them, but he did not determine a date on which the backpay period should begin. In view of the various dates on which the strikers made application for reinstatement, we shall order the backpay period for each striker to begin 5 days after the date of such striker's application and to run until the date of reinstatement, with actual dates to be determined in compliance proceedings.[4]

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[4] For the reasons set forth in his partial dissent in *Sea-Way Distributing, Inc.*, 143 NLRB 460 at 461-462, Member Brown would order backpay for the discharged strikers from the date each received the Respondent's letters of March 16 and 17, or the date on which each applied for reinstatement, whichever is earlier. As to those strikers who had not applied prior to receipt of the termination notices, in Member Brown's view it cannot now be determined whether they continued on strike despite their discharge or whether their failure to make formal application resulted from the Respondent's refusal to reinstate, except as new employees, those who did apply prior thereto. Hence all are entitled to full backpay.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and orders that the Respondent, Florida Machine & Foundry Company and Fleco Corporation, Jacksonville, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Insert in paragraph 1(d), line 1, following the words ". . . . wage surveys . . ." the phrase "within a reasonable time,"

2. Delete from paragraph 2(d) of the Recommended Order, the words "in the section entitled 'The Remedy'," and substitute therefore the word, "herein."

3. Appendix A is modified by adding the name of Percy Jackson.

4. Insert in the fifth indented paragraph of Appendix B following the words ". . . . wage surveys . . ." the phrase, "within a reasonable time . . ."

Dated, Washington, D.C. March 13, 1969.

GERALD A. BROWN, Member
HOWARD JENKINS, JR., Member
SAM ZAGORIA, Member
(Seal) National Labor Relations Board

APPENDIX G

TXD-269-68
Jacksonville, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

FLORIDA MACHINE & FOUNDRY
COMPANY AND FLECO CORPORATION

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO

Cases Nos. 12-CA-3831
12-CA-3915 (1-3)

Arthur R. Mattson, Jr., Esq., Tampa, Fla., for the General Counsel.

O. R. T. Bowden and *Charles Henley, Esqs.* (*Hamilton & Bowden*), Jacksonville, Fla., for the Company.

William C. McCall, Orlando, Fla., and *William T. Edwards*, Tampa, Fla., for the Union.

Trial Examiner's Decision

Statement of the Case

Melvin Pollack, Trial Examiner: This proceeding was heard in Jacksonville, Florida, on January 23, 25, 1968, pursuant to an amended consolidated complaint issued on October 30, 1967, and amended at the hearing, upon charges filed on various dates in April, July and October 1967, by the United Steelworkers of America, AFL-CIO, herein called the Union. The principal allegation of the complaint is that Respondent Florida Machine & Foundry Company and Fleco Corporation, herein called the Company, violated Section 8(a)(1), (3) and (5) of the National

Labor Relations Act, as amended, by refusing to bargain in good faith with the Union over the terms of a collective bargaining contract and by refusing to reinstate employees who struck in protest against the Company's unlawful conduct. After the close of the hearing, the General Counsel and the Company filed briefs which I have carefully considered.

Upon the entire record, including my observation of the witnesses, I make the following:

Findings and Conclusions

I. The Business of the Company

The Company manufactures machinery parts at its plant in Jacksonville, Florida. Its interstate sales during the 12-month period preceding the issuance of the complaint exceeded $50,000. I find that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Company's Pre-election Conduct*

Pursuant to a representation petition filed by the Union, the Board conducted an election at the Company's plant on September 22 and 23, 1966. About 2 or 3 weeks before the election, the Company's vice presidents, Thomas Madison and Thomas Peacock, interviewed prospective voters. Alex Chance testified that Madison called him into the production office and asked him if he knew anything about "the fellows . . . trying to get a Union in there." Chance answered "no" and Madison told him to report back "any-

body trying to get a Union in here." Chance said he would do so and Madison reminded him that the Company had a bad strike in 1958 and remarked that Chance had "a big family" and could not afford to lose his job.[1] James Kitchens testified that Madison called him into the foundry office, asked him how he felt about the Union, and reminded him about the 1958 strike. Thomas Lewis testified to the same effect. Eddie Brown testified that Madison told him that men "lost their jobs and homes" during the 1958 strike, that if the Union came in now it would cause strikes, and that he and Company President Russell did not want a union. Alexander Brown testified that Madison said that Brown had 5 kids, that Brown had worked 4½ years for the Company, that the Union was trying to get in, and that the Company did not want the Union. Madison asked Brown what he thought about the Union and if he had heard "anybody say anything about it." Brown replied that he was "not for the Union" and that he had not heard anyone talk about the Union. Joe Singleton testified that Madison spoke to him in the "old personnel office." Madison noted that Singleton had been with the Company "quite a while" and had given "no trouble." He inquired if Singleton had gone to union meetings and if he was a member of the Union. Singleton said he had been to a few union meetings but that he was not a union member. Madison asked Singleton if he remembered the 1958 strike and Singleton answered, "Of course." Madison said a lot of men had good jobs but they struck and lost their homes, their automobiles, and other things. He also said "one thing was sure," that if the Union came in, "we'll never sign a contract."

John Handley and Herbert Wright testified to interviews by Vice President Thomas Peacock. Peacock told Handley that he wanted to talk to him about the Union, that he

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[1] Madison had Chance's personnel file "in front of him" during the interview.

understood that Handley wanted a better job, and that he would get it "after everything was over." He reminded Handley that he was "not getting any younger," that "according to the record" he had "a big family," and that it was hard to get a job at his age. Peacock spoke to Wright in the warehouse office. He showed Wright his personnel file and said Wright was "a good worker" who "didn't get into any trouble." Peacock asked Wright what he thought about the Union and Wright said he thought it was "a good idea" because it would improve "working conditions and seniority and so forth." Peacock said if the Union won, it would not get a contract because "it was a non-union job." He added that the men "were making good money" and told Wright to get up and leave.[2]

The Company's officials also spoke to groups of employees about the coming election. Thomas Lewis testified that President Franklin Russell "made a speech out in the front to everybody that day" in which he said the Company did not want a union, that "it could be like it was in '58," and that employees who went "out" would lose their jobs. James Withers testified that Russell spoke to the day shift employees 2 or 3 weeks before the election, that he talked about the 1958 strike, urged the employees to vote "no," and concluded his remarks by saying he was going to say "something that's not lawful for me to say. We won't have a Union." Joe Singleton placed the meeting a week or two before the election. He said Russell spoke about the 1958 strike, promised the employees "a lot of work," and said "this is the way I would vote" as he put an "X" in the "No" box of a ballot-like chart. Charles Martin testified that Russell said among other things that he did not think the employees needed a union and that it was not "a policy of the Company to have one."

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[2] On cross-examination Wright repeated his prior testimony except for Peacock's alleged statement that the Union would not get a contract if it won the Board election.

Alex Chance testified that about a month before the election, Plant Superintendent George Peacock told the "whole night shift" that he had heard "the boys was trying to get a Union in there" but that it was not a union job and that a union would never be brought in there "as long as he had something to do with the plant." Chance further testified that President Russell spoke to the night shift before the election and said "I'd vote just like this" as he marked "a big, wide piece of paper" with a "No" vote.

Harold Mays testified that Foreman Frazier Rhoden came to his house 2 or 3 weeks before the election, said he understood that Mays was "one of the Union pushers," and, in a discussion about the Union, declared that "the Company would never sign a contract with any union." Lephus Felton testified that about 2 or 3 weeks before the election, Foreman Luke Morgan remarked to him and other employees that he knew how Mr. Russell felt about unions and that he would never sign a contract with the Union.

B. *The Bargaining Negotiations Before the Strike*

The Union won the September 1966 election and was certified on October 3 as the collective-bargaining representative of the Company's production and maintenance employees. The Union submitted a written contract proposal to the Company on October 10. The first bargaining session occurred on November 28.[3] The parties reviewed the Union's contract and agreed on recognition and union responsibility clauses, a 60-day probationary period for new employees, management control of hours of work, pay for a holiday occurring during an employee's vacation, no cumulative vacations, regular pay plus vacation pay if an employee elected to work during his scheduled vacation if

[3] A meeting had been scheduled for October 27, but no bargaining occurred that day as only a single employee-member of the Union's negotiating team appeared. The Company negotiators were present.

requested to do so by the Company, leaves of absences without loss of seniority for death in the family and serious illness, union use of plant bulletin boards, and submission of discharges to the contract grievance procedure. Company attorney Bowden said he would prepare a counterproposal for the Company. Union representative Edwards urged the Company "to meet as soon as possible, preferably in a succession of days." Bowden said he had a busy schedule and could not meet again until December 19. Edwards objected but Bowden insisted that he had other commitments. The parties agreed to meet again on December 19.

At the December 19 meeting, the Company submitted a complete contract proposal.[4] The proposal included the following provisions:

ARTICLE II

Management Rights

A. The management of the Company's plants and the direction of its working forces, including the right to establish new jobs, abolish or change existing jobs, increase or decrease the number of jobs, temporarily or permanently, change materials, processes, products, equipment, to subcontract any of the manufacturing, warehousing and delivery, to discontinue, temporarily or permanently, in whole or in part, its business of manufacturing and delivery, to increase or decrease the number of working hours per day or per week, shall be vested exclusively in the Company and not subject to arbitration. The Company shall be the sole judge of applicants for employment, their qualifications and physical fitness. Subject to the provisions of this

[4] The Company's proposal eliminated or modified agreements reached on November 28, including those on holiday and vacation pay, leaves of absence, union use of bulletin boards, and submission of discharges to the contract grievance procedure.

Agreement, the Company shall have the right to schedule and assign work to employees to be performed, recall employees who are laid off, demote, suspend, discipline or discharge for any cause not in violation of this Agreement.

B. In addition to items mentioned in Paragraph "A," the Company reserves and retains in full and completely any and all management rights, prerogatives and privileges, except to the extent that such rights, prerogatives and privileges are specifically limited by this Agreement. Such management rights as the Company reserves in Paragraph "A" and "B," and those rights which are not limited by this Agreement, shall not be subject to arbitration if this be provided for by this Agreement.

Article VII

Grievances

A grievance is defined as a dispute between the Company and its employees over the application, interpretation or alleged violation of a specific provision of this Agreement.

Should an employee have any grievance, an earnest effort shall be made to adjust such grievance immediately in the following manner:

A. *Step No. 1:* Within three (3) days after the occurrence of the thing or event on account of which the employee shall feel aggrieved, such aggrieved employee, accompanied by his steward and the department foreman shall attempt to adjust such grievance.

B. *Step No. 2:* If such grievance is not adjusted under Step No. 1 above within two (2) days after the decision of the department foreman, the employee shall, within said two-day period, if he elects to further pursue the grievance, reduce such grievance to writing,

giving all material facts and witnesses, which shall be signed by the aggrieved employee and dated. Such written statement shall immediately be referred to the Business Agent of the Union and Department Manager, who will attempt to adjust the grievance.

C. *Step No. 3:* If such written grievance is not adjusted under Step No. 2 above within five (5) days from its submission to the Department Manager, the aggrieved employee and the Union may refer the matter to a Management designee, who will attempt to adjust such written grievance within ten (10) days from the date of its receipt.

D. Employees are not to leave their jobs for the purpose of investigating, presenting, handling or settling grievances. All such activities are to be done on off time of all employees concerned without pay from the Company. The Company will cooperate in this respect and will make available its representatives at mutually convenient times.

E. Company prerogatives and reserved rights of management shall not be subject to grievance procedure.

F. If time limitations set out in this Article are not observed or waived in writing by both Company and Union, the grievance in which such non-observance occurred shall be considered null and void and at an end.

Article VIII

Arbitration

Any grievance which remains unsettled after having been fully processed through the grievance procedure pursuant to Article VII may be submitted to arbitration upon the written request of either the Company or the Union, provided such request is made within twenty (20) days after the final decision of the Com-

pany and provided further the other party agrees to arbitrate the said grievance.

If the parties cannot agree to arbitrate the dispute, then either party may resort to its economic power under the following terms and conditions:

Ten (10) days after the answer is received denying a request for arbitration, either party may give written notice by registered mail declaring the No-Strike No-Lockout Clause inapplicable to the dispute between the parties as to the subject matter of the grievance only. Such written notice regarding said No-Strike No-Lockout Article shall be effective for a period of thirty (30) days after such notice declaring No-Strike No-Lockout Article inapplicable, as aforesaid, is received by the other party. The giving and receipt of said notice in reference to the No-Strike No-Lockout Article, or the institution of a strike or lockout pursuant thereto, will not in any way change, alter or affect any condition, agreement or requirement of this contract, except as specifically set forth in this Article, and the contract shall remain in full force and effect for its stated term in all other respects.

If the Union does not call a strike, and the Company does not institute a lockout during the thirty (30) day period following receipt of notice as stated above, then, in that event, the No-Strike No-Lockout Article automatically become effective again on the 31st day following receipt of said 30-day notice until again declared inapplicable under this Agreement or until expiration of this Agreement, whichever occurs first.

If the Union calls a strike or the Company institutes a lockout during the said 30-day period, the No-Strike No-Lockout Article shall continue inapplicable to said strike or lockout so long as said strike or lockout is effective and current. At the conclusion of the strike or lockout, upon agreement of the parties upon the dis-

puted grievance, the No-Strike No-Lockout Article shall automatically become effective again.

Rights of management not specifically limited by this Agreement are hereby reserved by the Company and shall not be subject to arbitration.

Article XI

No Strike Clause

A. The Union will not cause or engage in or permit its members to cause or engage in, nor will any member of the Union take part in any strike, sit-down, stay-in, slow-down, picketing or sympathy strike in or upon premises or equipment of the Company, or against the Company upon other premises or equipment, or any curtailment, interruption or interference with work of the Company or its agents, servants or employees, nor cause such action to its members or any other person.

B. Any employee participating in any action contrary to this Article may be disciplined by the Company by layoff or discharge in the discretion of the Company.

C. The Company agrees that it will not cause a lockout of employees during the life of this Agreement. It is understood and agreed that a lockout means a voluntary, complete cessation of operations of the Company to prevent employees from working.

D. For violation of this Article, the parties consent to the entry of a state court consent temporary restraining order without necessary legal notice against the offending party. Before this Section is invoked, the offending party shall be notified immediately of the violation.

E. The parties agree that in the event of a breach of the Union's no-strike promise contained in this Ar-

ticle, such breach shall not be referable to the grievance procedure herein, but shall be the subject of a suit or action in federal or state court at the Company's discretion.

F. If a strike occurs in violation of this Article, the Company shall not be required to discuss the dispute in question, or any other matter or grievance, while such strike is in effect.

Article XII

Contract Constitutes Entire Agreement of Parties

The parties acknowledge and agree that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject matter included by law within the area of collective bargaining and that all the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right to request or require further collective bargaining, and each agrees that the other shall not be obligated to bargain collectively with respect to any matter or subject not specifically referred to or covered by this Agreement, whether or not such matters have been discussed, even though such subjects or matters may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement. This Agreement contains the entire contract, understanding, undertaking and agreement of the parties hereto and finally determines and settles all matters of collective bargaining for and during its term, except as may be otherwise specifically provided herein.

The Company's proposal also made its working rules part of the contract, provided for seniority by job classification within a department, and retained its existing practices as to overtime work, insurance,[5] vacations, and holidays. The proposal noted that job classifications and wage rates were "To Be Negotiated."

The Union accepted with some modifications, the Company's proposals on recognition clause, voluntary union membership and union activity in the plant,[6] union visitation of the plant, a 60-day probationary period for new employees, absenteeism, bulletin boards, production work by supervisors, some leave of absence provisions, a Military clause, washing facilities, and safety equipment. The Company said it would make no wage offer because a wage survey showed that its wages were equal to or better than those paid by other companies in the Jacksonville area. The Union rejected the Company's proposed management rights, Company rules, arbitration, no-strike, and "Entire Agreement" clauses. The parties did not resolve their differences on seniority, grievance procedure, or economic items such as call-in pay, overtime pay, holidays and vacations.

At the end of the meeting, Bowden said he would check at his office and notify union representative McCall about a date for the next meeting. Bowden did not call McCall, who tried unsuccessfully to reach Bowden before leaving town. A meeting was scheduled for January 6, 1967, when

[5] The Company notified its employees on August 3, 1966, that a revised insurance plan expanding hospital, medical, and surgical benefits, and increasing life insurance to $5,000, had been scheduled to go into effect on August 1, but had been put "on the shelf" because the Union had claimed representative status on August 2.

[6] Union representative McCall said the Union would agree to the Company's proposals on union membership and activity "as long as we had the check-off provision in the agreement." Bowden said the checkoff "would not bar us from getting a contract."

McCall reached Bowden by telephone at his home a few days later.

The parties did not significantly change their bargaining positions at the January 6 meeting.[7] At the end of the meeting, Attorney Bowden said the Company wanted its insurance representative, Horovitz, at the next meeting and that he would have to work out a meeting date with Horovitz. Staff representative Edwards urged the Company to meet more frequently and said there was no need to wait on Horovitz "as he was just going to be talking about one item, anyhow." The Company insisted that no meeting be scheduled until Horovitz could attend.

The next meeting was held on January 25, 1967. Horovitz explained the Company's insurance and pension plan and left the meeting. The Company offered to increase the daily hospital room rate from $9 to $15 a day and, based on a new survey, it also offered to increase the wages of 4 skilled classifications.[8] The Company accepted a grievance procedure clause drafted by the Union which left the question of compulsory or voluntary arbitration open. The parties' positions otherwise remained unchanged.

Meetings were held before a Federal Mediator on February 7, 13 and 22. At the February 7 meeting, the Union *inter alia* offered to "consider" the Company's no-strike clause if the word "permit" was changed to "authorize,"

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[7] In addition to agreeing to a union grievance committee of 7 rather than 14 members, the Union said it would draft a new seniority provision. The Union dropped its demand for plant-wide seniority but did not accept the Company's proposal for seniority based upon departmental job classification. The Company reduced the number of hours to be worked for vacation eligibility from 1,800 to 1,700, the Union asking for 1,500.

[8] The proposed increase applied to about 30 of the 300 employees in the bargaining unit.

to accept the Company's management rights clause,[9] and to drop its demand for call-in pay, if the Company would increase wages 22 cents across the board, add a holiday, and increase hospital benefits to $20 per day, room and board. The Company refused to modify its no-strike clause and turned down the Union's proposals on wages, holidays, and insurance benefits. It offered, however, to increase shift differentials by 2 cents and to give a wage increase of 8 cents across the board. The positions of the parties did not change materially at the meeting on February 13. At the February 22 meeting, the Union insisted *inter alia* on a 20-cent wage increase, the day after Thanksgiving as a holiday, time and a half pay after 8 hours, compulsory arbitration, its no-strike, no lockout clause, and exclusion of the Company's rules as part of the contract. The Company rejected the Union's demands. At a union meeting on February 26, the members rejected the Company's contract offer and authorized a strike.

C. *The Strike*

The strike began at 9:30 p.m. on February 28, 1967. That night, Plant Superintendent George Peacock told Alexander Brown and Elton Stewart "behind the furnace" that he appreciated their "staying in here and helping me out" and that he was going to give them "a dime raise." Peacock also told four or five employees in the shipping area, including Elijah Fishburne, Johnnie Hall, and Clifford Hall, that the guys who remained in the plant that night would receive a 10-cent an hour raise. The next morning, striker James Withers, a carpenter, was allowed to come into the plant to get some tools "to do some church work." As Withers unlocked his box, Vice President Thomas Peacock suggested that he "take it all" because he would not work

[9] The Union suggested that the clause be modified to provide that the Company would not subcontract work with an object of discriminating against union members. The Company agreed to this modification.

there again. On Friday, March 3, Plant Superintendent George Peacock told Alex Chance and one or two other employees who had come to the plant for their paychecks that hey were replaced and terminated. Chance was not in fact replaced until March 13, according to a list compiled from the Company's personnel records.

Striker Johnnie Snead, a crane operator, reported to the plant on Monday morning, March 13, and told Superintendent Peacock he wanted to go back to work. Peacock went to the "main office" and, on his return about 45 minutes later, told Snead he had been replaced, but that he "could go upstairs and put in an application and start over as a new man." Snead said, "I'll be damned, after 12 years?" and Peacock said, "That's the way it goes." Snead said he would not accept a job "as a new man" and asked about his checks. Peacock left to get Snead three checks due him. Upon Peacock's return with the checks, James Mulloy, a non-striker, asked him who was going to run the crane. Peacock said, "Just a minute," and handed Snead his checks. As Snead was leaving the plant, Foreman Rhoden asked him, "What happened?" Snead replied, "They wanted me to start back as a new man," and Rhoden shook his head.[10] The Company's replacement list shows that six crane operators (Snead, Avery Cobb, Albert Perry, Van Driggers, Howard Robinson, and Albert Purdy) were strikers, that Perry was hired on March 13 as a replacement for Purdy, and that Van Driggers was not replaced until March 15.

On March 15, strikers J. E. Sarrells, Melvin Ponce, Raymond Miller, and Ralph Hodges told Foreman Luke Morgan they wanted to go to work.[11] Morgan said they had been replaced and "would have to come back as new

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[10] Snead noticed as he entered the plant at 7:30 a.m. that his crane "was parked—there was nobody in it."

[11] Sarrells and Ponce were set-up men, and Miller and Hodges were welders.

employees." As the men "started back out," Personnel Manager Cline told Sarrells that they "could go back to work if [they] filled out the applications."[12] Sarrells returned to the plant 6 weeks later and was hired as a set-up man at his old rate of pay but with "loss of seniority and vacation time"

On March 16 and 17, the Company sent letters to about 160 strikers advising them that they had been permanently replaced and were terminated. The Company thereafter employed strikers only upon personal application at its personnel office and as new employees.

Welder Carl Hillyard asked about his job 3 or 4 weeks after the strike began and was told by one Norman Wilcox, speaking for Foreman Luke Morgan, that Morgan had no job open for him. Hillyard "a little bit" later asked another applicant for employment whether he had been hired by Morgan. This applicant, who was on his way to the personnel office, said he had been hired by Morgan. Hillyard asked him "what he was applying for" and was told "welder."

Machinist George Loznicka asked Plant Superintendent George Peacock for work on May 30, saying that he "heard that if you wanted to go back you'd have to go back as a new man." Peacock said they had "plenty of work" and a place for Loznicka and that his rate of pay would be the same as it was before the strike. He instructed Foreman Grady Ivey to take Loznicka to the Personnel office when he came in the next morning to "fill out a application and be photographed." Loznicka later that day decided he did not want to return as a new employee and sent word by a friend to Ivey that he "wouldn't be in."

By telegram dated July 10, the Union advised the Company that it had directed "all striking members . . . to re-

[12] The Company's striker replacement list shows replacements for these four men before March 15.

turn to work as soon as possible beginning" Monday morning, July 10, that the telegram was "the Union's official notice that all strikers hereby request to return to work," and that the return to work was not conditioned upon any union demand "save that such employees be put to work on the same job each previously held or on a similar job of equivalent pay." The Company thereafter accepted applications from strikers and recalled many of them to work as new employees.

Plant Superintendent George Peacock testified that the Company was short of men in "most job classifications when the strike began, that supervisors and office personnel performed some production work at that time "as an emergency measure," and that this situation continued for the first month of the strike. He further testified that for the first 2 months of the strike "new groups" of employees were brought to the plant by a motor vehicle with "quite a few seats in it—not a big bus." He confirmed that many of those employees had no prior training in the type of work performed at the plant, that they were hired on a 30-day probationary period, that 10 to 15 percent of the new employees turned out to be "unsatisfactory," and that another 10 to 15 percent failed to show up after the first day or two of work.

D. *Bargaining Meetings During and After the Strike*

The Company and the Union met before the Federal Mediator on March 14, May 1, and August 7, 1967. No concessions were made by either party at the March 14 meeting. The Union reduced its wage request from 20 cents to 18 cents across the board at the May 1 meeting. At the August 7 meeting, the Union offered concessions with respect to its "Intent and Purposes" clause, inclusion of the Company rules in the contract, insurance, physical examinations, and departmental seniority, and dropped its request for an additional holiday. The Company agreed to change the word "permit" to "authorize"

in its no-strike clause. By letter dated August 8, 1967, Edwards notified Attorney Bowden that the Union would accept a 15-cent an hour general wage increase. Edwards asked Bowden for the names, jobs, aid rates of pay of the employees currently employed in the bargaining unit, and also asked him for the area surveys on which the Company had based its position on wages during the negotiations.[13] On August 15, Bowden advised Edwards by letter that the Company "was hesitant to furnish the names of employees" because of the "large number of instances involving violence and intimidation by strikers against employees working." Bowden forwarded with this letter a letter dated June 12, 1967, from Vice President Madison which referred to an area wage survey as supporting the Company's proposed wage increases for certain skilled employees. The Union never received any actual area wage survey from the Company.

On October 2, 1967, the Company without notice to the Union put into effect wage increases offered to the Union during the bargaining negotiations.

E. *Analysis and Conclusions*

1. The refusal to bargain

I find upon the entire record that although the Company met with the Union and exchanged contract proposals, it did not bargain in good faith, as required by the Act, that is, "with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor." *Globe Cotton Mills* v. *N.L.R.B.*, 103 F. 2d 91, 94 (C.A. 5); *N.L.R.B.* v. *Herman Sausage Co.*, 275 F. 2d 229, 231-232 (C.A. 5). The record shows:

1. The Company foreshadowed its failure to bargain in good faith when, during the pre-election campaign period,

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[13] The Union had initially requested the area survey data by letter dated May 31, 1967.

its officers and other management personnel stated to employees that the Company did not want the Union and would not sign a contract with the Union if it did win the election.[14] *Billups Western Petroleum Company,* 169 NLRB No. 147.

2. The Company disregarded its obligation under Section 8(d) of the Act to meet and negotiate with the Union with reasonable frequency. At the first bargaining session on November 28, 1966, Union representative Edwards asked for another meeting "as soon as possible" and suggested that the parties meet "preferably in a succession of days." The Company refused to meet again until December 19, because of Attorney Bowden's insistence that he had a busy schedule and other commitments. After the December 17 meeting, Bowden failed to call Union representative McCall, as he had agreed to do, about a date for the next meeting, and a meeting was arranged for January 6, 1967, only when McCall reached Bowden by telephone at his home a few days later. At the January 6 meeting, the Company insisted that no meeting be scheduled until its insurance representative, Horovitz, could attend to explain the Company's insurance and pension plan. It adhered to this position although Union representative Edwards protested that Horovitz would be talking just "about one item."[15] In

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[14] The employee testimony to this effect is quite detailed and mutually corroborative. For this reason, and as the employees otherwise impressed me as reliable witnesses, I have credited their testimony over the testimony of the Company's witnesses where in conflict. Although the conversations and speeches in question occurred more than 6 months before the filing of the charges in this case, they are properly considered under Section 10(b) of the Act as background against which to assess the later negotiations.

[15] The Company notified the employees on August 3, 1966, that it had worked out with the insurance company an increase in the hospital room rate from $9 to $15 a day, expanded benefits in other areas of coverage (including maternity benefits), and an increase in life insurance to $5,000. According to the notice, the

consequence the next meeting was not held until January 25, 1967.

3. The Company proposed and insisted throughout the negotiations that the Union accept contract clauses which drastically curtailed the Union's representation rights.[16] Article II A of its proposed contract, titled "Management Rights," vested in the Company, "not subject to arbitration," the right to establish, abolish or change jobs; to change materials, products, processes, and equipment; to subcontract or discontinue operations; and, "Subject to the provisions of this agreement," the right to schedule and assign work, to recall laid-off employees, and to demote, suspend, discipline, or discharge employees. Article II B further reserved to the Company without recourse to arbitration "any and all management rights, prerogatives and privileges" not "specifically limited" by the contract. Article VII E, Grievances, excluded from the grievance procedure "Company prerogatives and reserved rights of man-

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Company had to place "this new medical program on the shelf" because of the Union's representation claim. Although the Company insisted that negotiations be postponed until Horovitz could be present to explain the insurance and pension plan, it does not appear that Horovitz or any other company representative mentioned the improvements previously worked out with the insurance company. The Company never offered the Union insurance benefits equal to those cited in the August 3 notice to the employees.

[16] Of course, "the Board may not, either directly or indirectly compel concessions or otherwise sit in judgment on the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404. However, good faith or its lack is a question of fact as to state of mind, and positions taken at the bargaining table, considered in the context of the whole case, are manifestations of the state of mind with which negotiations are conducted. *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 498-499; *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 139-140 (C.A. 1), cert. den., 346 U.S. 887; *N.L.R.B.* v. *National Shoes, Inc.*, 208 F. 2d 688, 691-692 (C.A. 2).

agement." Article VIII, Arbitration, similarly excluded reserved management rights from arbitration. Under Article XII, Contract Constitutes Entire Agreement of Parties, the contract settled "all matters of collective bargaining for and during its term" and the parties waived their right to bargain on matters not covered by the contract "even though such subjects or matters may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or signed this Agreement." As the Company included in its proposals no improvements in existing conditions of employment which might compensate the employees for this sweeping relinquishment by the Union of their right to representation, its proffered contract was one which the Union could not possibly justify to the employees and hence frustrated rather than furthered collective bargaining.[17] Yet the Company never significantly retreated from its initial bargaining position, so making negotiations an exercise in futility, for without the Company's proposed contract the Union at least retained unimpaired its statutory right to advance consultation and bargaining before the Company could effect changes in the employees' wages, hours, and other conditions of employment.

4. The Company insisted on a stringent no-strike clause and also insisted on voluntary arbitration of grievances. Although the Company's arbitration clause implicitly modified the no-strike clause to permit the Union to strike over a grievance upon 10-day notice after Company denial of a request for arbitration, other provisions in the Company's proposed contract greatly curtailed matters subject to the grievance procedure. Accordingly, the Company as a practical matter was insisting that the Union virtually surren-

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[17] In presenting this proposed contract on December 19, 1966, more than 2 months after receiving the Union's contract proposal, the Company ignored agreements reached at the November 28 negotiations on the Union's proposed contract.

der its right to strike without the usual *quid pro quo* of compulsory arbitration of grievances. *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 455; *Texas Coca-Cola Bottling Company,* 146 NLRB 420, 429, enforced 365 F. 2d 321 (C.A. 5).

The Company contends that its good-faith bargaining is demonstrated by its not taking "a firm hard attitude on every single item" and by its making of "several major concessions to the Union" on seniority, a no-strike clause, and wages. On seniority, the Union proposed plant-wide seniority and subsequently agreed to departmental seniority. The Company never deviated from its initial position that seniority be limited to job classifications within a department and ultimately insisted on its own seniority proposal, rejecting a revised union proposal as "just too complicated." As to wages, the Company initially rejected the Union's wage demands in their entirety on the ground that its wage rates were equal to or better than those in the Jacksonville area. Allegedly based on a new area survey, the Company on January 6, 1967, offered to increase the wages of several skilled job classifications to keep them in line with rates for comparable classifications in the area and, on January 25, it offered to increase shift differentials by 2 cents and to give a general wage increase of 8 cents. The Company thereafter refused to supply the Union with area wage survey data. After the strike, on October 2, 1967, it unilaterally put its proposed wage increases into effect allegedly because it was at a "competitive disadvantage in the local labor market" and was not satisfied with "the caliber of applicants."[18] On August 7, 1967, after the Union called off the strike, the Company agreed to a change in wording of its no-strike clause so that the Union would not be liable for unauthorized strikes. The

[18] About a month before the wage increase, the Company removed a notice from the bulletin board stating that it would be "unlawful" to give wage increases.

Company, however, never retreated from its insistence that the Union accept far-reaching limitations on its right to strike together with voluntary arbitration of grievances, and rejected a union proposal to leave both no-strike and arbitration provisions out of the contract.

Under all the circumstances, I find that the Company made no meaningful concessions on any major issue and that its wage offers and other concessions made "here and there" amounted to no more than "surface bargaining" and were part of "a purposeful strategy to make bargaining futile or fail." *N.L.R.B.* v. *Herman Sausage Co.*, 275 F. 2d 229, 231-232 (C.A. 5). I conclude that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union.

I also find that the Company further violated Section 8(a)(5) of the Act by refusing to comply with the Union's requests for area wage survey data,[19] and by unilaterally increasing wages on October 2, 1967.[20]

2. The refusal to reinstate strikers

As the strike which began on the night of February 28, 1967, is attributable to the Company's failure to bargain in good faith,[21] the strikers under settled law were entitled

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[19] This matter was fully litigated at the hearing and is within the scope of the complaint.

[20] I find nothing improper in the Company's refusal to supply the Union with the names, classifications, and wages paid to employees after the strike began. Attorney Bowden explained that the Company was hesitant to supply the names of employees because of the "large number of instances involving violation and intimidation by strikers against employees working" and offered to supply information on the wages paid to any strike replacement believed by the Union to be paid more than was the replaced striker. Cf. *W. L. McKnight, d/b/a Webster Outdoor Advertising Company*, 170 NLRB No. 144.

[21] *Billups Western Petroleum Company*, 169 NLRB No. 147.

to reinstatement upon application notwithstanding their having been replaced. The Company therefore violated Section 8(a)(3) and (1) of the Act by its purported replacement and discharge of virtually all strikers on March 16 and 17, 1967,[22] and by its refusal to reinstate strikers to their former jobs upon their individual application or upon the Union's application of July 10, 1967, in their behalf.[23]

3. Prolongation of the strike

The General Counsel contends that even if the strike started as an economic one, the Company's discharge of the strikers, promises of wage increases to nonstrikers, and illegal refusal to supply the Union with area wage surveys and data concerning employment during the strike, converted the strike into an unfair labor practice strike. Plant Superintendent George Peacock's promises of wage increases to a few nonstrikers on the evening of February 28, 1967, tended to interfere with their statutory right to join the strike and hence were violative of Section 8(a)(1)

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[22] *Cincinnati Cordage and Paper Co.*, 141 NLRB 72, 75-76.

[23] The Union's telegram recited that it was "the Union's official notice that all strikers hereby request to return to work." I find without merit the Company's contention that the telegram did not qualify as an unconditional offer to return to work because it also recited that the Union had directed the strikers "to return to work as soon as possible." Unlike *Ozark Dam Constructors*, 99 NLRB 1031, 1038-1041, the telegram requests reinstatement to their old jobs of all strikers and the record warrants no finding that the parties had an understanding that the strikers were to make individual applications for reinstatement. Such individual applications would have been futile as shown by the Company's discharge of strikers on March 16 and 17, 1967, and its insistence before and after receiving the Union's telegram that returning strikers apply for new employment. *N.L.R.B.* v. *Valley Die Cast Corporation*, 303 F. 2d 64, 65-67 (C.A. 6).

of the Act,[24] and I have found the refusal to furnish area wage survey information to the Union after the strike began violative of Section 8(a)(5) of the Act. Although these unfair labor practices bear upon the Company's state of mind during the bargaining negotiations, I see no connection between them and the duration of the strike. The promise to a few nonstrikers of wage increases well below those sought by the Union would hardly tend to prolong the strike, nor do I see any such impact in the circumstances of this case stemming from the Company's failure to comply with the Union's requests for its area wage surveys.

Assuming an economic strike, any striker was entitled to reinstatement to his job without loss of seniority or other rights and privileges, as distinguished from nondiscriminatory consideration for new employment, only if his job was vacant when he first applied for reinstatement. *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375; *Union Bus Terminal of Dallas, Inc.*, 98 NLRB 458; see *Bartlett Collins Co.*, 110 NLRB 395, 398. The Company's letters of March 16 and 17, 1967, notifying strikers that they had been permanently replaced and were terminated, followed prior refusals to reinstate strikers seeking to return to work and served notice upon the strikers that they could return to work, regardless of vacancies that might arise, only as new employees. The letters were sent out at a time when the Company was experiencing a considerable turnover in personnel. It appears, however, that the Company was successful in obtaining a steady flow of applicants for employment. In these circumstances, the letters, albeit based on a mistaken view of the law that hiring of a "permanent" replacement terminates an economic striker's

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[24] Paragraph 12 of the complaint attributed this conduct to the Company's "officers, agents and representatives, more particularly Vice President Thomas Peacock." As the matter was fully litigated, I do not consider the variance between complaint and proof a bar to an unfair labor practice finding. Accordingly, the Company's motion to dismiss paragraph 12 is denied.

employment status,[25] only confirmed what the strikers must have already known—that the Company had substantially succeeded in filling their jobs. See and compare *John W. Thomas Co.*, 111 NLRB 226.

I find that the Company did not engage in conduct during the strike which prolonged the strike.[26]

IV. Conclusions of Law

1. The Company violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union on and after November 28, 1966, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit: All production and maintenance employees, including truckdrivers and warehousemen, employed by the Company at Jacksonville, Florida, but excluding office clerical employees, draftsmen, professional employees, guards and supervisors as defined in the Act.

2. The Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with copies of its area wage surveys, and by unilaterally increasing wage rates on October 2, 1967.

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[25] Section 2(3) of the Act provides that the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current dispute . . . and who has not obtained any other regular and substantially equivalent employment . . . ." See *Fleetwood Trailer Co., supra.*

[26] The record shows that a crane operator job was open when striker Johnnie Snead sought to return to work on March 13, 1967. Snead would be entitled to reinstatement and back pay from that date, even assuming that he was an economic striker. Similar findings are not warranted with respect to strikers J. E. Sarrells, Melvin Ponce, Raymond Miller, and Ralph Hodges, who sought to return to work on March 15, 1967, Carl Hillyard who sought to return later in March, or George Loznicka, who asked for work on May 30. Although work was available for them, the record does not establish that their former jobs had been vacated by their replacements when they sought to return to work.

3. The strike which began on February 28, 1967, was caused by the Company's failure to bargain in good faith with the Union.

4. The Company violated Section 8(a)(3) and (1) of the Act by its purported replacement and discharge of unfair labor practice strikers, and by failing or refusing to reinstate the strikers listed in the attached Appendix A upon their individual applications to return to work or upon the Union's request of July 10, 1967.

5. The Company violated Section 8(a)(1) of the Act by promising wage increases to nonstrikers.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

Having found that the Company engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Company discriminatorily refused to reinstate the employees listed in the attached Appendix A. I shall therefore recommend that the Company offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons employed by Respondent after February 28, 1967. If there is not then sufficient work available for the remaining employees including those offered reinstatement, all available positions shall be distributed among them without discrimination because of their union activity or sympathy, in accordance with such system of seniority or other non-discriminatory practice heretofore applied by the Company in the conduct of its business. All such employees for whom jobs are not available after such distribution shall be placed on a non-discriminatory prefer-

ential hiring list. I shall further recommend that Respondent make the strikers whole for any loss of pay suffered because of the discrimination against them. The loss of pay under the order recommended shall be computed in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289, with interest added thereto in the manner set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

I shall further recommend that Respondent bargain with the Union upon its request.

As the unfair labor practices of Respondent found herein go to the heart of the Act, it will be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Recommended Order

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that the Respondent, Florida Machine & Foundry Company and Fleco Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promising employees wage increases to induce them not to engage in protected strike activity.

(b) Discouraging membership in the Union, or any other labor organization, by discriminatorily discharging or refusing to reinstate employees because they engaged in lawful strike activity, or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

(c) Refusing to bargain in good faith with the Union.

(d) Refusing to furnish the Union with area wage surveys or with other information relevant to the intelligent performance of its functions as the collective bargaining representative of the employees in the appropriate unit.

(e) Unilaterally effecting wage increases or other changes in the conditions of employment of the employees in the appropriate unit.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Upon request, meet and bargain collectively with the Union with promptness and frequency concerning the negotiation of a contract.

(c) Notify and consult the Union, and afford it an opportunity to bargain collectively, with respect to any changes in wages, or other terms and conditions of employment before effectuating such changes.

(d) Offer to all unfair labor practice strikers whose names are listed in the attached Appendix A, immediate and full reinstatement to their former or substantially equivalent positions, and make each striker whole for any loss of pay he may have suffered because of the discrimination against him, in the manner set forth in the section entitled "The Remedy."

(e) Notify the employees whose names are listed in the attached Appendix A, if presently serving in the Armed Forces of the United States, of the right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(f) Preserve and make available to the Board or its agents, for examination and copying, all payroll records,

social security payment records, timecards, personnel records and reports, and all other records necessary or useful in computing the amount of backpay due, as herein provided.

(g) Post at its Jacksonville, Florida, plant, copies of the attached notice marked "Appendix B."[27] Copies of said notice, on forms provided by the Regional Director for Region 12, shall after being duly signed by Respondent, be posted immediately upon receipt thereof, and be maintained for 60 consecutive days, thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 12, in writing, within 20 days from the date of receipt of this Trial Examiner's Decision, what steps Respondent has taken to comply herewith.[28]

It is further recommended that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated at Washington, D. C.

MELVIN POLLACK
Melvin Pollack
Trial Examiner

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[27] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[28] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 12, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX A

Name	Name	Name
Snead, Johnnie	McCloud, Walter Lee	Waters, Nazaree
Hendley, Arthur	Lovelace, Albert	Booth, Adell
Brown, Alexander	Hunter, Theodore	Lewis, Thomas
Dove, John	Jones, Roosevelt	Sheppard, Edward
Kelly, Curtis	Martin, Charles	Benton, George
Loyd, William	Perry, Albert	Clark, Horace
Cannon, Melvin	Clark, Earnest	Peoples, Dewery
Ansley, Alfred	Mines, Malichi	Mungin, Robert
Craddick, Nathan	Seniors, Thomas	Smith, Charlie
Cummings, Kenneth	Dasher, Joseph	Withers, James C.
Jenkins, Earnest	Smith, Ben	Kohn, Edward
Thomas, Ronald	Cauldin, Edward	Wilson, Henry Lee
Newton, James	Smith, Walter L.	Mosley, Isiah
Davis, William	Bellamy, Wilber	Daniels, David
Reddick, Ora	Seymore, Grover	Robinson, Charles
Gates, Oscar Lee	Smith, Dan	Mays, Harrell E.
Shanks, James	Jackson, McArthur	Ponce, Merlin
Ware, George	Thomas, George	Gamble, Willie
Johnson, Frankland	Collins, Willie L.	Wesley, Glenn
Mobley, Roy	Wright, Herbert	Terrell, Edward
Vason, James O.	Christie, Frank	Brown, Ronald
Shirah, Freddie	Livingston, Edward	Jones, Freddie Lee
Wyman, Earl C.	Jackson, Edward	Benge, Roy R.
Driggers, Van	Felton, Willie	Toske, Leroy
Singleton, Joe	Wrights, Frank	Ricketson, Willie H.
Christie, Richard	Miller, Henry	Thomas, Marion
Gillyard, Sylvester	Hunter, Jesse L.	Fishburne, Elijah
Harrell, Willis	Fudge, Jay Lynn	Boggs, Willie
Newbill, James	Purdy, Willie	Mack, John E.
Crawford, Sam	Loznicka, George	Goodman, William H.
Howard, Lennie	McCallister, Harold	Butler, Jimmie
Perry, John	Hildum, Roy	Girtman, Vogie
Woodward, Joseph	Handley, John W.	Chance, Alex
Cross, Lorinza	Stokes, Ben	Bryant, Melvin
Rivers, Henry Lee	Causey, John A.	Nelson, Pressie
Badger, John	Smith, Rufus	Brown, Walter Lee
Wyche, Joseph	Johnson, Richard	Williams, Terry
Cobb, Avery	Robinson, Howard	Walker, Odis
Robinson, Joseph	Harris, Alonzo	Jackson, Willie
Mobley, Alden	Brown, Eddie	Baxter, Samuel

NAME	NAME	NAME
Evans, Billie	Gordon, Thomas	Sapp, Robert Lee
McCleary, Isaac B.	Wright, Willie B.	Badger, George
King, Clement	Harris, Bobby	Fountain, Alpheus
Young, James	Moore, Nelson	Gunder, Carther
Reid, Jonathan	Hodges, Ralph	Ramsey, Willie
Wright, Edward D.	Sweat, Tenly	Mincey, Arthur
Taylor, Charles E.	Hillyard, Carl	Henderson, Jimmy Lee
McCanless, Franklin	Britt, Robert A.	Allen, Billy
Tomlinson, John R.	Hartley, Owen	Miller, Raymond
McManus, Charles	Laurendine, Bobby	Waye, Eugene
Allen, Andrew	Perkins, Ellis	Wells, John A.
Purdy, Albert	Sarrells, J. E.	Causey, Earl
Felton, Lephus	Shivar, John	Tomlinson, Eugene
Scantling, Frank	Green, Edward	Kitchens, James
Daniels, Benjamin	Peterson, Samuel	Collins, Robert
Reid, Luther B.		

APPENDIX B

TXD-269-68

NOTICE TO ALL EMPLOYEES

Pursuant to

The Recommendation of a Trial Examiner of the
National Labor Relations Board
and in order to effectuate the policies of the
National Labor Relations Act
(As Amended)

we hereby notify our employees that:

WE WILL NOT discourage membership in UNITED STEELWORKERS OF AMERICA, AFL-CIO, or any other labor organization of our employees, by refusing to reinstate unfair labor practice strikers upon their unconditional requests, or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT promise our employees wage increases to induce them to refrain from supporting union-sponsored strikes or other union activity.

WE WILL NOT refuse to bargain collectively with the Union by failing to meet for contract negotiations with reasonable promptness and frequency.

WE WILL NOT change wages, hours, or any term or condition of employment of our employees in the bargaining unit, without notifying, consulting, and bargaining with the Union, as the exclusive representative of our employees in the appropriate unit set forth below.

WE WILL NOT refuse to furnish the Union, upon its request, with our area wage surveys, or with any other relevant data necessary and useful for the purposes of collective bargaining.

WE WILL NOT refuse to bargain in good faith with the Union as the representative of our employees in the appropriate unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL, upon request, bargain collectively and in good faith with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of our employees in the appropriate unit, and embody in a signed agreement any understanding reached.

WE WILL, upon request, meet and bargain collectively with the Union with promptness and frequency concerning the negotiation of a contract.

WE WILL notify and consult the Union, and afford the Union an opportunity to bargain collectively, with respect to any changes in wages, or other terms and conditions of employment before effectuating such changes.

WE WILL offer to all unfair labor practice strikers whose names are listed in APPENDIX A attached to the Trial Examiner's Decision, immediate and full reinstatement to their former or substantially equivalent positions, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them.

WE WILL notify any of the employees whose names are listed in APPENDIX A to the Trial Examiner's Decision, if presently serving in the Armed Forces of the United States, of the right to full reinstatement upon application in accordance with the Selective Service Act and

the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

The bargaining unit is:

All production and maintenance employees including truckdrivers and warehousemen employed at the Jacksonville plant, but excluding office clerical employees, draftsmen, professional employees, guards, and supervisors as defined in the Act.

FLORIDA MACHINE & FOUNDRY COMPANY
AND FLECO CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602 (Tel. No. 228-7711).

APPENDIX H

29 U.S.C. § 158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * *

29 U.S.C. § 160. Prevention of unfair labor practices—Powers of Board generally

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented

from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

APPENDIX I

The Company's management rights proposal read as follows:

"A. The management of the Company's plants and the direction of its working forces, including the right to establish new jobs, abolish or change existing jobs, increase or decrease the number of jobs, temporarily or permanently, change materials, processes, products, equipment, to subcontract any of the manufacturing, warehousing and delivery, to discontinue, temporarily or permanently, in whole or in part, its business of manufacturing and delivery, to increase or decrease the number of working hours per day or per week, shall be vested exclusively in the Company and not subject to arbi-

tration. The Company shall be the sole judge of applicants for employment, their qualifications and physical fitness. Subject to the provisions of this Agreement, the Company shall have the right to schedule and assign work to employees to be performed, recall employees who are laid off, demote, suspend, discipline or discharge for any cause not in violation of this Agreement.

"B. In addition to items mentioned in Paragraph "A", the Company reserves and retains in full and completely any and all management rights, prerogatives and privileges, except to the extent that such rights, prerogatives and privileges are specifically limited by this Agreement. Such management rights as the Company reserves in Paragraphs "A" and "B", and those rights which are not limited by this Agreement, shall not be subject to arbitration if this be provided for by this Agreement."

In *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 398 (1952) the Company there proposed:

"The right to select and hire, to promote to a better position, to discharge, demote or discipline for cause, and to maintain discipline and efficiency of employees and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is agreed that an employee feeling himself to have been aggrieved by any decision of the company in respect to such matters, or the union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the company made by such top management officials shall not be further reviewable by arbitration."

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1527

FLORIDA MACHINE & FOUNDRY COMPANY and FLECO CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported; its initial opinion (Pet. App. 7a-22a) remanding the case to the Board is reported at 441 F. 2d 1005. The Board's initial decision (Pet. App. 23a-62a) is reported at 174 NLRB 1156, and its decision after remand (Pet. App. 4a-6a) is reported at 190 NLRB No. 109.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a) was entered on February 25, 1972. The petition for a writ of certiorari was filed on May 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the company failed to bargain in good faith with the union.

2. Whether substantial evidence supports the Board's finding that the strike was caused by the company's unlawful refusal to bargain and that therefore the company violated Section 8(a)(3) of the National Labor Relations Act by discharging and refusing to reinstate its striking employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 62a-66a.

STATEMENT

A. The Board's Findings of Fact

On October 3, 1966, the United Steelworkers of America, AFL-CIO, was certified as the bargaining agent of the Company's production and maintenance employees at its Jacksonville, Florida, machinery

parts production plant (Pet. App. 32a). During the election campaign which preceded the certification, Company management personnel consistently asserted that, even if the Union prevailed in the election, the Company would never enter into contractual relations with it (Pet. App. 30a-32a; A. 222-223, 235, 252-253, 271-272, 282, 291).[1]

The Union submitted its initial written contract proposal to the Company on October 10 (Pet. App. 32a; A. 402-403, 77-97). The first bargaining session occurred on November 28 (Pet. App. 32a; A. 382). At that session, the parties reviewed the Union's proposed contract, and agreed on several matters (Pet. App. 32a-33a). Company attorney Bowden said he would prepare a counterproposal for submission to the Union (Pet. App. 33a; A. 423). The Union urged, without success, that the Company agree "to meet as soon as possible, preferably in a succession of days, so the negotiations would have some consistency and flow." The Company, however, would not agree to meet again until December 19 (*ibid.*).

At the December 19 meeting, the Company submitted a complete contract proposal which omitted or modified several of the terms agreed upon by the parties at the first meeting (Pet. App. 33a, n. 4; A. 404, 426-427, 98-116). The Company proposal included a "management rights" clause which provided

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[1] "A." refers to the Appendix to the briefs in the court below.

in substance that most decisions affecting working conditions would be reserved exclusively to the Company and would not be subject to the grievance procedure; that the grievance procedure would terminate only in voluntary arbitration; and that strikes (and lockouts)—except those over a grievance for which arbitration had been refused—would be prohibited for the duration of the agreement. (Pet. App. 33a-38a; A. 98-99, 102-105, 106-107.) The Company proposal also made its work rules part of the contract, and retained its existing practices on overtime work, vacations, and holidays (Pet. App. 39a; A. 99, 431, 436, 108-109). Finally, a "zipper" clause provided that each party "unqualifiedly waives the right to request or require further collective bargaining * * * with respect to any matter or subject not specifically referred to or covered by this Agreement" (Pet. App. 38a; A. 107-108).

Although the Company proposal recited that job classifications and wage rates were "[t]o [b]e [n]egotiated" (Pet. App. 39a; A. 110), Company representatives promptly advised the Union that the Company would make no wage offer because a wage survey showed that its wages were equal to, or better than, those paid by other companies in the Jacksonville area (Pet. App. 39a; A. 437-438). The Union rejected the Company's proposed management rights, Company rules, arbitration, no-strike, and "zipper" clauses.[2] And no agreement was reached on other

[2] The Union accepted certain of the Company's proposals with some modifications. These included clauses relating to recognition, Union visitation of the plant, absenteeism, bulle-

issues, which included seniority, grievance procedures, and such economic items as call-in pay, overtime pay, holidays, and vacations (Pet. App. 39a; A. 430-439).

The next meeting did not take place until January 6, 1967, despite Union efforts to get the Company to agree to an earlier meeting (Pet. App. 39a-40a; A. 439-441). At that meeting, the parties did not significantly change their bargaining positions (Pet. App. 40a; A. 445-450). Although the Union again urged that the next meeting not be delayed, the Company would not agree to meet until January 25 (Pet. App. 40a; A. 474-475, 448). At this meeting the Company's insurance representative explained the Company's insurance and pension plan and the Company offered to increase the daily hospital room rate from $9 to $15 a day. In addition, based on a new survey, it also offered to increase the wages of four skilled classifications affecting approximately 30 of 300 unit employees (Pet. App. 40a; A. 454-457). The Company accepted some modified grievance procedure language drafted by the Union, but continued to object to any compulsory arbitration (Pet. App. 40a; A. 458-459, 124-126). The parties' positions otherwise remained essentially unchanged (Pet. App. 40a).

At the February 7 meeting, attended by a Federal mediator, the Union offered to accept the Company's

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tin boards, production work by supervisors, leaves of absence, military service, washing facilities, and safety equipment (Pet. App. 39a; A. 429-432, 435, 437-439).

management rights clause and to drop its demand for call-in pay, if the Company would increase wages 22 cents across the board, add a holiday, and increase hospital benefits to $20 per day (Pet. App. 41a; A. 480-481). The Company rejected the Union's proposals. It offered, however, to increase shift differentials by 2 cents and to give a wage increase of 8 cents across the board (Pet. App. 41a; A. 484, 486). No further progress was made and on February 26, the Union members rejected the Company's contract offer, and resolved to strike because "the Company had not bargained in good faith." The Union informed the Company that it had filed charges with the Board alleging bad faith bargaining, and that the strike, which began on February 28, was in support of those charges. (Pet. App. 41a; A. 492-493, 127-128.)

At a meeting on May 1, the Union reduced its wage request from 20 to 18 cents (Pet. App. 44a; A. 496). On May 31, the Union requested the Company to furnish the area survey data upon which it had based its offer of wage increases for four job classifications during the negotiations. The Union also requested the Company to supply the "names, job titles and rates of pay for each employee [in] the bargaining unit who is presently employed," so that the Union could assess reports reaching its office that the Company was paying striker replacements more than the strikers had earned prior to the strike. (Pet. App. 25a, 45a, n. 13; A. 139-140.) On July 31, after another Union request for the information,

the Company advised the Union that it was not paying premium rates to those currently working. Again the Union's request for specific data was ignored (A. 143, 144).[3]

At a meeting on August 7, the Union offered concessions with regard to certain of its demands, and the Company agreed to change the word "permit" to "authorize" in its no-strike clause (Pet. App. 44a-45a; A. 496-499). The following day the Union indicated that it would accept a 15-cent an hour general wage increase (Pet. App. 45a; A. 145-146). The offer apparently met with no response. But on October 2, without notice to the Union, the Company put into effect wage increases in the amount offered to the Union during bargaining negotiations (Pet. App. 45a; A. 392-394; 500-501, 400-401). No further bargaining sessions were held, and no agreement was reached.

B. The Decisions Below

1. *The initial decisions*

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union (Pet. App. 24a), by unilaterally increasing wage rates (Pet. App. 50a), by refusing to supply the Union within a rea-

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[3] On August 15, the Company stated that it would not furnish the names of the employees in the bargaining unit because of the "large number of instances involving violence and intimidation by strikers against employees working" (Pet. App. 25a, 50a n.20; A 74-75). The area survey information was never supplied (Pet. App. 25a, 50a; A 76-77, 499).

sonable time with copies of area wage survey data, and by refusing altogether to furnish it with information concerning the identity, wage rates, and job classifications of its employees (Pet. App. 24a-25a, 50a). The Board also found that the strike was caused by the Company's unlawful refusal to bargain, and that the Company thus violated Section 8(a)(3) and (1) of the Act by discharging, and refusing to reinstate upon their unconditional offer to return to work, the unfair labor practice strikers (Pet. App. 50a-51a). Finally, the Board found that the Company promised wage increases to employees in return for their nonsupport of the strike, in violation of Section 8(a)(1) of the Act (Pet. App. 51a-52a).[4]

The court of appeals (with one judge dissenting) remanded the case to the Board for reconsideration of its finding that the Company bargained in bad faith. The court found that "[t]here is evidence in the record from which to conclude that the Employer was not acting in good faith" (Pet. App. 10a), but held that some of the language used by the Trial Examiner, whose decision the Board adopted, suggested that the finding of bad faith may have been "based on the fact that the Board did not approve of certain of the proposals advanced by the Employer in the course of negotiations" (Pet. App. 13a). Ac-

[4] On February 28, 1967, the night the strike began, Plant Superintendent Peacock promised at least 5 employees that those who stayed at work that night would receive a 10-cent an hour raise (Pet. App. 41a; A. 263, 371-372).

cordingly, the court concluded that, "in fairness to the Employer, however reprehensible its behavior, we must remand the proceedings to the Board for reconsideration" (Pet. App. 12a).[5]

2. *The decisions after remand*

In its supplemental decision, the Board "reexamined the entire record, including the court's opinion" and reaffirmed its original decision and order (Pet. App. 5a). The Board "reviewed those portions of the Trial Examiner's Decision * * * which the court concluded led to an inference that the Company must affirmatively make concessions during bargaining," and stated that, "to the extent the language used by the Trial Examiner may so imply, we do not rely on it." The Board also expressly declined to adopt the "Trial Examiner's incorrect characterization of the 8-cent wage offer [made shortly before the strike] as not meaningful since, standing alone, it may well be construed as a reasonable offer." (Pet. App. 5a-6a.) The Board concluded (Pet. App. 6a):

> Our review of the entire record, including the disavowal of certain language noted previously, does not, however, persuade us that a different conclusion is warranted here and we still conclude that the Employer has failed to bargain in good faith based upon the following: (1) As background, the company statements prior to the representation election to the effect that the Com-

[5] The court postponed consideration of the other issues in the case "[u]ntil the Board has reconsidered the questions [raised] by this opinion" (Pet. App. 20a).

pany did not want the Union and would not sign a contract if the Union won the election; (2) the Company's failure to cooperate with the Union in scheduling bargaining sessions; (3) the Company's failure to supply the Union with wage data within a reasonable time after its request therefor; (4) the promises of wage increases to employees who did not support the strike; and (5) the Company's insistence on contract proposals which would have drastically curtailed the Union's representation rights. These proposals included a management rights provision which would have vested in management broad authority to take action affecting working conditions without consulting the Union and without subjecting such action to review in a grievance arbitration proceeding. Our inference of bad faith was and is based on the totality of the Employer's position, and not his position on any single contract provision.

The Board's order requires the Company, *inter alia*, to bargain in good faith with the Union upon request, to offer immediate and full reinstatement to the unfair labor practice strikers, and to make them whole for any loss of pay suffered because of the Company's discrimination against them. (Pet. App. 6a, 26a-27a, 55a-62a.)

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-2a).

ARGUMENT

1. Petitioner contends that the "prime factor" leading to the Board's conclusion that the Company failed to bargain in good faith was the Company's insistence "on contract proposals which would have 'drastically curtailed the Union's representation rights,' " and that to predicate an unfair labor practice finding on this factor is contrary to *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, and *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99 (Pet. 6-7).

First, as shown (pp. 9-10), the Board based its finding that the Company bargained in bad faith on the totality of the Company's conduct. Thus, in addition to relying on the nature of the Company's contract proposals, the Board relied on repeated Company warnings—less than three months before bargaining commenced—that the Company would not sign a union contract or permit a union in the plant; the Company's dilatory tactics at the bargaining table; its refusal to provide and its delay in furnishing information pertinent to bargaining issues;[6] and the action of the Plant Superintendent Peacock in offering a 10-cent raise—more than the Company had offered in bargaining—to employees who would work during the strike. There is no basis for petitioner's

[6] The Board found that this conduct constituted an independent violation of Section 8(a)(5) of the Act (Pet. App. 24a-25a, 50a). The Company does not contest that finding here.

assertion that those other factors were "clearly secondary and could not, standing alone, sustain a finding of bad faith" (Pet. 8). The Board did not so characterize them; nor did the court of appeals when, in its initial opinion, it noted that "there is evidence in the record from which to conclude that the employer was not acting in good faith" (*supra*, p. 8).

Second, petitioner errs in contending (Pet. 6-8) that the Board must close its eyes to the content of a party's proposals at the bargaining table when assessing good faith or the lack of it. This Court has made clear that that determination is made by "drawing inferences from the conduct of the parties as a whole." *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 498. Indeed, in *American National Insurance Co., supra*, the Court acknowledged that, while insistence on a management functions clause was not a *per se* violation of the Act, the Board was not foreclosed from finding, in an appropriate case, that insistence on particular contract terms had been employed as a means of evading the obligation to bargain in good faith (343 U.S. at 409).[7]

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[7] *Chevron Oil Co.* v. *National Labor Relations Board*, 442 F. 2d 1067 (C.A. 5), is not to the contrary. There, the court found that the evidence did not support the Board's findings that the company had no intention to deal in good faith with the union or was dilatory in scheduling meetings and supplying information. The court found that the company's bargaining proposals represented only "hard bargaining" rather than, as here, a desire to avoid dealing with the union (442 F. 2d 1070-1074). Compare *Tex Tan Welhausen* v. *National*

The Board's decision is not contrary to *H. K. Porter* v. *National Labor Relations Board, supra.* There, the Court invalidated a Board order which specifically required the employer to grant the union a checkoff provision even though it had not agreed to such a proposal in collective bargaining. The Board's order here does not require the Company to agree to any particular contract provision; it merely requires the Company to bargain in good faith about terms and conditions of employment (Pet. App. 56a).

2. Petitioner's challenge (Pet. 9-12) to the Board's finding that the strike was attributable to the Company's unlawful bargaining conduct merely presents an evidentiary issue which does not warrant further review. The decision below does not, as petitioner suggests (Pet. 10), conflict with cases holding that credible evidence must support the finding that an unfair labor practice had a causal connection with a strike. The court of appeals here did not suggest that such a showing was not required and there is credible evidence to support the Board's finding. Petitioner does not dispute that "unfair labor practices preced[ed] the strike" (Pet. 10). Among those unfair practices were deliberate efforts by the Company to delay contract negotiations with the Union as well as the submission of bargaining proposals (such as the management rights provision) which, when viewed in light of its pre-election threats never to sign a

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Labor Relations Board, 434 F. 2d 405 (C.A. 5), certiorari denied, 402 U.S. 973, affirming with modification, 419 F. 2d 1265 (C.A. 5).

contract, supported the finding that petitioner did not bargain in good faith prior to the strike. The failure to so bargain, along with the uncontradicted testimony that the employees voted to strike because of the Company's bad faith bargaining tactics (*supra*, p. 6), provide sufficient evidentiary support for the Board's finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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